

**“Unintentional Discrimination”
“Appearance and Gender”**

**By: Walter J. Timby, III, Esquire
Margolis Edelstein**

I. Appearance Based Discrimination

To date, most employers have been largely free to discriminate against the unattractive. A few nations, such as France, have outlawed discrimination based on physical appearance. Only a few jurisdictions in the U.S., such as the District of Columbia and Santa Cruz, California, have enacted legislation prohibiting discrimination in employment based on physical appearance. Otherwise, employers largely have been free to take good looks into account when making hiring or employment decisions. Recently however, physical appearance as discrimination has been attacked with greater frequency under the guise of gender or disability discrimination.

In considering our analysis of appearance based discrimination, we should examine the environment, the context of the law and Courts that will be applying the statutes to the alleged novel theories of liability against employers

A. Legislation Prohibiting Appearance Based Discrimination

The District of Columbia's statute prohibiting employment discrimination includes "personal appearance" as a protected category. D.C. Code Ann. § 2-1402.11(a)

"Personal appearance" is defined as the "outward appearance of any person, irrespective of sex, with regard to bodily condition or characteristics, manner or style of dress, and manner or style of personal grooming, including but not limited to, hairstyle and beards." D.C. Code Ann. § 2-1401.02(22).

The Santa Cruz ordinance prohibits discrimination based on, among other things, "physical characteristics" which are defined as "a bodily condition or characteristic of any person which is from birth, accident or disease, or from any natural physical development, or any event outside the control of that person including individual physical mannerisms." Santa Cruz Municipal Code § 9.83.01.

A Michigan statute prohibits discrimination based on height or weight, but it does not provide coverage for other aspects of physical appearance. Mich. Comp. Laws § 37.2202(1)(a).

A statute written as broadly as the District of Columbia's would seemingly permit all sorts of displays of personal expression in the workplace. Tongue studs, nose rings, tattoos, brightly colored hair, even body odor likely would have to be accommodated. A reported case brought under the District of Columbia's statute illustrates some of the problems posed by this type of legislation.

Atlantic Richfield Co. District of Columbia Commission on Human Rights, 515 A.2d 1095 (D.C. App. 1986), involved an employee claiming to have been constructively discharged by her supervisor's comments about her appearance. The supervisor said the claimant's blouses were too tight, causing buttons to pop open and show cleavage and she questioned the cost of the clothes. The claimant's supervisor also criticized other aspects of her behavior including claimant's sitting with her legs open; her overly friendly approach to some office visitors and her rudeness to messengers and co-workers; her boisterous behavior and her mentioning the employer's name during a scene at a restaurant. The Commission found that the claimant was discriminated against based on her personal appearance and constructively terminated by her supervisor's "continuing barrage of derogatory comments about her appearance, behavior, and morality". The Appellate Court affirmed. The Court recognized that much of the "barrage of 'derogatory comments' addressed the claimant's behavior rather than her appearance, but it agreed with the Commission that the "non-appearance subjects a respondent's criticism or merely pre-text for harassment that was motivated by disapproval of her personal appearance."

Under such an approach, how an employer would maintain a dress code or prohibit inappropriate dress or behavior likely to lead to claims of sexual harassment is a bit of a mystery. To tell an employee to button up her blouse would risk a claim of personal appearance discrimination; to allow her to roam about the workplace unbuttoned would

almost certainly result in a hostile environment claim from an offended co-worker.

1. New Jersey's Law Against Discrimination

New Jersey has asserted itself as a national leader in recognizing and responding to the changing realities of the modern workplace. The Law Against Discrimination (LAD) establishes as a civil right an employee's right to protection from discrimination in his or her employment if he or she possesses any of the specific characteristics enumerated within the statute. New Jersey is one of only 13 states whose anti-discrimination statute applies to all employers regardless of the size of their workforce, even if the employer has only a single employee.

New Jersey Law Against Discrimination N.J. SAT. § 10:5-12 (2006) – Unlawful Employment Practices, Discrimination

It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination: (a) For an employer, because of the race, creed, color, national origin, ancestry, age, marital status, domestic partnership status, **affectional or sexual orientation**, genetic information, sex, **disability** or atypical hereditary cellular or blood trait of any individual, or because of the liability for service in the Armed Forces of the United States or the nationality of any individual, or because of the refusal to submit to a genetic test or make available the results of a genetic test to an employer, to refuse to hire or employ or to bar or to discharge or require to retire, unless justified by lawful considerations other than age, from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment; provided, however, it shall not be an unlawful employment practice to refuse to accept for employment an applicant who has received a notice of induction or orders to report for active duty in the Armed Forces; provided further that nothing herein shall be construed to bar an employer from refusing to accept for employment any person on the basis of sex and those circumstances or sex is a bona fide occupational qualification, reasonably necessary to the normal operation of the particular business or enterprise; provided further that nothing herein contained shall be construed to bar an employer from refusing to accept for employment or to promote any person over 70 years of age; . . .

The New Jersey Supreme Court has held that the objective of the LAD is "nothing less than the eradication of a cancer of discrimination." The LAD states that it should be liberally construed with regard to the rights of covered employees. It further mandates,

however, that this provision shall be construed fairly and justly with due regard to the interest of all parties.

a) What is Handicapped?

In an attempt to ensure protection for those with serious disabilities, while preventing unforeseen and excessively broad applications of disability discrimination claims, the Federal American with Disabilities Act (ADA) limits its protection to individuals possessing "a physical or mental impairment that substantially limits one or more of the major life activities of such individual," having a record of such impairment, and/or being regarded as having such impairment.

New Jersey, however, has no minimum threshold pertaining to the degree and/or duration of an asserted handicap. The LAD prohibits "any unlawful discrimination against any person because such person is or has been at any time, handicapped, or any unlawful employment practice against such person, unless the nature and extent of the handicap reasonably precludes the performance of the particular employment." The LAD defines handicap as follows:

From suffering from physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness including epilepsy, and which shall include, but not be limited to, any degree or paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment or physical reliance or any service or guide dog, wheelchair, or other remedial appliance or device or from any mental, psychological or developmental disability resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques. And handicapped shall also mean suffering from AIDS or HIV infection.

b) Physical and Non-Physical Categories

The LAD thus defines two distinct categories of handicapped: physical and non-physical.

An employee alleging a physical handicap must show he or she is "(1) suffering from physical disability, infirmity, malformation or disfigurement (2) which is caused by bodily injury, birth defect or illness including epilepsy."

An employee alleging a non-physical handicap must show he or she is "is suffering (1) from any mental, psychological or developmental disability (2) resulting from an anatomical, psychological, physiological or neurological condition that either (a) prevents the normal exercise of any bodily or mental functions or (b) is demonstrable medically or psychologically, by accepted clinical or laboratory diagnostic techniques.

c) Handicapped Under LAD is broader than the ADA

Courts have interpreted the LAD's definition of handicap as being far broader than the definition of disability under the American with Disabilities Act (ADA) and particularly because **the LAD does not include the ADA requirement of a substantial limitation on a major life activity**. A recent New Jersey Appeals Court decision has opined that, in assessing LAD handicap claims, an inquiry into the employee's asserted handicap will generally be less significant than an inquiry into the employer's response to the employee's presentation of the asserted handicap.

During the two decades after the New Jersey LAD has been enacted, the Courts have found employees alleging obesity, substance abuse, gender dysphoria and back injury to have protected handicaps, but rejected claims of employees alleging hypersensitivity to second-hand cigarette smoke and claims relating to current use of illegal drugs.

Conclusion

Although New Jersey has not specifically legislated the issue of handicapped and appearance based discrimination, can the New Jersey Courts be far behind given the broad interpretation of the LAD and its given purpose. It can be concluded that the employee's claim will be interpreted by New Jersey Courts to provide the benefit to the employee on any novel theory provided the alleged condition fits within the broad definition

of “disability “ and the Courts belief that it has the responsibility to eradicate the “cancer of discrimination in the work place.”

2. Attempts to Characterize Appearance for Sex Discrimination

“More Attractive v. Less Attractive”

The lack of specific legislation addressing physical appearance discrimination has not deterred plaintiffs and the Equal Employment for Opportunity Commission from suing for appearance/base discrimination. Characterized as sex discrimination, a situation in which a more attractive female is preferred over a less attractive female is often difficult. Proponents of the theory often invoke the precedents from the 1970’s and 80’s that did away with the notion that only sexy young women could serve as airline stewardesses, but they ignore the context of which those cases arose.

The plaintiff in *Jespersen R. v. Harrah’s Operating Company, Inc.*, 392 F.3d 1076 (9th Cir. 2004) was a bartender at Harrah’s Sports Bar for approximately 28 years. During much of her tenure, Harrah’s encouraged, but did not require, female employees to wear makeup. The plaintiff refused, claiming that makeup made her feel physically ill, degraded and interfered with her ability to perform her job. In 2000, however, Harrah’s implemented an “Image Transformation Program” for beverage department employees, which imposed specific appearance standards, including groomed, appealing to the eye, and having a firm body tone. Females were required to wear makeup, stockings, colored nail polish and wear their hair in a certain manner. Male employees had to maintain short haircuts and neatly trimmed fingernails and they were prohibited from wearing makeup. Plaintiff refused to comply with the makeup requirement. She was given 30-days to apply for a position that did not require makeup, but she failed to do so and was terminated.

The *Jespersen* Court maintained that grooming and appearance standards that apply differently to women and men do not necessarily constitute sex discrimination. The Court explained that employers are free to adopt different appearance standards for different genders as long as these standards do not impose a greater burden on one

gender than the other. In analyzing Harrah's policy, that **Jespersen** Court held that the total burden held for each gender must be compared; not just the makeup requirements for women and the makeup prohibition for men. The Court found the plaintiff had failed to present evidence establishing the financial cost and the time it required of women to put on makeup to comply with the employer's appearance standard, and even if she had, she would then have had to show that this cost outweighed the burden imposed on the male bartenders who were required to keep short haircuts and neatly trimmed fingernails. The court rejected plaintiff's argument that she was being discriminated against because of her failure to conform to a feminine stereotype.

In most cases, it will be difficult to qualify mere unattractiveness as a disability within the meaning of the American's with Disabilities Act or the LAD. The definition of "impairment" under the ADA is not meant to include ordinary physical characteristics such as, height, weight, eye color, hair color and the like.

Most cases to-date which have been the basis for an ADA and LAD suit have involved plaintiffs who are obese. The EEOC has taken the position that severe obesity qualifies as an impairment, as does obesity that results from physiological disorder, such as hypertension or thyroid condition. EEOC Policy for Guidance on Defamation the Term "Disability". In one case, **Cook v. Rhode Island Department of Mental Health**, 10 F.3d 17 (1st Cir. 1993), the court affirmed a jury verdict for the plaintiff and maintained that the jury could have possibly found that the plaintiff's morbid obesity to constitute an "impairment" under the Rehabilitation Act of 1973.

In **Marks v. National Communications for Association**, 72 F 2d.Supp. (2)(d) 322 (S.D.N.Y. 1999), a 270-pound telemarketer sued after she failed to obtain a promotion to outside sales representative. While at first supervisors told her, "I've told you, being outside sales, presentation is extremely important, lose the weight and you will get promoted," the plaintiff claimed that another telemarketer had obtained the promotion because she was "thinner and cuter." Her sex discrimination lawsuit attacked what she

described as “improper and discriminatory stereotypes,” of what is deemed to be “acceptable appearance of a female” on the part of her employer. **Marks’** court granted summary judgment for the employer. It described the plaintiff’s standard of proof as follows:

If Marks can prove that NCA maintained different weight standards for women than it used for men, whether explicit or not, she will have satisfied her burden of proving “gender plus” discrimination. Still discrimination based on weight alone, or on any other physical characteristic or for that matter, does not violate Title VII unless issues of race, religion, sex or national origin are intertwined.

The Court found the plaintiff failed to sustain her burden because she was unable to identify any overweight men who were working as outside sales representatives. The **Marks** case, thus, provides an accurate description of the law regarding physical appearance, discrimination – such discrimination is not unlawful unless different appearance standards are applied to men and women.

In **Viscik v. Fowler Equipment Company, Inc.**, 173 N.J. 1; 800 A.2d 826 (2002), Viscik was morbidly obese due to a genetic condition and suffered from related physical problems. The employer fired her after only four days of work at the employer’s small business allegedly for having a poor work ethic. It was agreed that the employee had proved with expert evidence that she was a handicapped person within the meaning of the LAD. The court found that the purposes of the New Jersey’s law against discrimination, the term “morbid” means diseased or pathologic, and “morbid obesity” means obesity sufficient to prevent normal activity.

In **Gimello v. Agency Rent-A-Car Systems, Inc.** the complainant employee claimed that he was a victim of a discriminatory discharge from employment because of his obesity, a condition unrelated to his ability to do his job as office manager for a car rental agency. The employer claimed that the complainant was terminated because of inadequate job performance. The Division of Civil Rights, confirming the findings of the Administrative Law Judge, concluded that the employer's reason for termination was

pretextual, not bona fide, and the complainant was really fired because of his actual or perceived obesity and not for any legitimate business reason.

In 2003, the EEOC took the concept of “regarded as” claim under the ADA beyond obesity and applied it to a plaintiff with a facial disfigurement. It sued McDonald’s for discriminating against an employee with Sturge Weber Syndrome, port wine stain coloration around most of the face. **EEOC v. R.P.H. Management, Inc., d/b/a McDonald’s** (N.D. Ala, Filed March 7, 2003). The EEOC’s original attorney declared:

Unfortunately, myths, fears and stereotypes continue to operate in the workplace to deny full employment opportunities to individuals with disabilities. One of the worst types of discrimination occurs when an individual with a cosmetic disfigurement is denied a job because of the unjustified belief that customers will be offended simply by seeing that person. The opportunity to make a living in the workplace is not restricted to models and movie stars, but is the promise out to every person with talent, skills and ambition.

Whether the Courts would buy such a broad reading of the ADA is less clear. At least one earlier case involving cosmetic disfigurements suggest not. In **Talanda v. KFC International Management Company**, 140 F.3d 1090 (7th Cir. 1998), the plaintiff was fired after hiring an employee with several teeth missing to work the front counter at a Kentucky Fried Chicken restaurant and then refused the supervisor’s directive to move the employee to a position out of view of customers. The supervisor remarked that the employee’s appearance was “not an appetizing situation” and that it was “really a turn-off to me as a customer to see that mouth”. The supervisor alleged that the employee retaliated against him in violation of the ADA by firing him for refusal to move the cosmetically disfigured employee away from the front counter. The district awarded summary judgment to the employer and the 7th Circuit affirmed.

The **Talanda** court maintained that whether the employee with the missing teeth had either an impairment within the meaning of the ADA or was regarded as having an impairment by her employer was not the issue. It pointed out that the impairment must “substantially limit one or more major life activities” in order to qualify for ADA coverage.

The court pointed out that it is this “major life activities” hurdle rather than the proof of concrete disability that screens out trivial claims under the ADA. The court found that the employee with missing teeth could not qualify under this standard because she was barred only from working at the front counter, not from working at any other job.

The **Talanda** court did not foreclose future facial disfigurement cases under the ADA. It held:

We do not mean to imply that facial disfigurement, including facial disfigurement caused by dental problems, can never be a disability for purposes of the ADA. Such an impairment can be so severe as to limit, or be perceived as limiting, an employee’s major life activity.

The Court then cited EEOC pronouncements noting that disparate treatment occurs when an employer excludes an employee with a severe facial disfigurement from staff meetings or customer complaints result in an employer discriminating against an employee with a prominent facial scar. But, the Court concluded, as with all impairments, however, it must be established that the impairment limits a major life activity or is perceived as limited a major life activity.”

While the **Talanda** case makes an important point, it cannot be a source of great comfort for employers in the future. This is because when the **Talanda** case was decided, the range of recognized "major life activities" was still somewhat circumscribed. Most courts still viewed them in terms of walking, talking, seeing, hearing and working. Interacting with others and having sexual relations had not yet been established as major life activities under the ADA. Now plaintiffs seeking to qualify their facial disfigurements as disabilities under the ADA must claim they are substantially limited by their condition from social or sexual interaction with others.

In New Jersey, under the LAD the courts are not bound by the restriction of “major life activities” thus making the New Jersey employer more vulnerable to this type of claim.

3. Sexual Orientation Discrimination

Traditionally, Title VII has not covered sexual orientation, *Simonton v. Runyon*, 232 F.3d 33 (2nd Cir. 2000); *Rightson v. Pizza Hut of America, Inc.*, 99 F.3d 138 (4th Cir. 1996) This view is based, in part, on the fact that federal legislation specifically prohibiting discrimination in employment based on sexual orientation, the Employment Non-Discrimination Act, has failed to pass Congress despite numerous tries. The reasoning goes that if Congress intended for sexual orientation discrimination to be unlawful it would have enacted this legislation.

Such legislation is presently found only at the state level in 11 states of which New Jersey's LAD is one of them.

4. Discrimination Against Transgendered Persons

A. Title VII Coverage

Until recently, Courts uniformly held that transsexuals are not covered by the sex discrimination of Title VII. For example, in *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984), the court held that "sex" under Title VII meant "biological sex" and not "sexual identity". As the court explained,

The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men. The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, i.e. a person born with a male body who believes himself to be female, or a person born with a female body who believes herself to be male; a provision against discrimination based on an individual's sex is not synonymous with a provision against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born.

In *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004), the Court reached a contrary result. In that case, a fire department lieutenant, who was born male and diagnosed with a gender identity disorder, brought a Title VII action against the City alleging sex discrimination. The case was dismissed by the district court, which held that Title VII does not prohibit discrimination based on an individual's trans-sexuality. The Sixth

Circuit reversed. The Circuit Court found that the plaintiff had sufficiently pled claims of sexual stereotyping and gender discrimination under a Price Waterhouse analysis. It noted that most of the prior decisions denying transsexuals Title VII protection were decided prior to Price Waterhouse and that Price Waterhouse eviscerated those precedents.

After Price Waterhouse, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination will not occur but for the victim's sex. It follows that employers who discriminate against men because they do wear dresses or makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.

The **Smith** Court concluded that Title VII protects transsexuals.

Which Restroom?

One of the most difficult questions employers face in accommodating a transgendered employee is which restroom such a person should use. One alternative is to allow transsexual workers, like all other employees, to use the restroom appropriate for their gender presentation. Once a transsexual has begun coming to work in her new role, she should use any restroom designated for her new gender. In short, restrooms use should not depend on genitalia. Since genitals are not used in the performance of most jobs, they should not be the subject of inquiry for employers or workers.

While perhaps well-intentioned this approach is too simplistic and unrealistic. Concerns raised by employees forced to share a restroom with an employee of the opposite sex who was in the process of transitioning to the other sex cannot be so easily dismissed. A male employee in the early stages of the transition process toward becoming a female is likely to cause consternation, if not panic, upon entering a women's restroom.

In **Sommers v. Budget Marketing, Inc.**, 667 F.2d 748 (8th Cir. 1982) the plaintiff, a transsexual, was terminated as a result of a number of female employees threatening to quit if she was allowed to use the women's restroom. The court affirmed dismissal of the case on the ground that Title VII does not cover transsexuals, observing the appropriate remedy is not immediately apparent "to this Court."

American Airlines has taken the opposite approach. In its Workplace Guidelines for Transgendered Employees:

Restroom access issues need to be handled with sensitivity not only to our obligation to provide transitioning employees with the same level of restroom access available to non-transgendered employees, but also to the emotional responses of co-workers to the idea of sharing facilities with a transgendered co-worker. A restroom access policy is clear. An employee should use a facility based on his/her current gender. However, once transition is complete, a transgendered employee has the right to the same access as a non-transgendered employee of the same gender.

This approach does not eliminate the possibility of harassment of the employee still in the process of transition who is required to use the restroom of his former sex. Rather, it would tend to lessen the impact on other employees required to use a restroom with an employee who is not yet of the same sex.

The Minnesota Supreme Court addressed the issue of restroom use by a transgendered employee in ***Goins v. West Group***, 635 N.W.2d 717 (Minn. 2001). In that case the plaintiff, a transsexual who had not undergone genital reconstruction surgery, used the women's restroom in her new workplace. This caused female employees to express concern about using a restroom with an employee who is biologically a male. The employer then required the plaintiff to use a single-occupancy restroom on another floor or in a different building. The plaintiff refused to comply and suggested instead that her co-workers be trained and educated as to allay their fears.

After being threatened with disciplinary action, the plaintiff resigned, alleging that a hostile working environment had developed. She sued under the Minnesota statute prohibiting gender identity discrimination. She argued that the employer had violated this statute by designating restroom use according to biological sex rather than an employee's self-identified gender.

The Minnesota Supreme Court rejected this argument, holding that the statute cannot be read to govern an employer's designation of restroom use.

II. Other Forms of Unintentional Discrimination

1) Smoking

Employment Discrimination

N.J. Sat. § 34:6B-1 (2006) Smoking, use of tobacco products shall not affect employment.

No employer shall refuse to hire or employ any person or shall discharge from employment or take any adverse action against any employee with respect to compensation, terms, conditions or other privileges of employment because that person does or does not smoke or use other tobacco products, unless the employer has a rational basis for doing so which is reasonably related to the employment, including the responsibilities of the employee or prospective employee.

34:6B-2 Law, workplace policies not affected

Nothing contained in this Act shall be construed to affect any applicable laws, rules or workplace policies concerning smoking or the use of other tobacco products during the course of employment.

34:6B-3 Aggrieved person may institute civil action

Upon a violation of any provision of this Act, an aggrieved person may, in addition to any other available remedy, institute a civil action in a court of competent jurisdiction, within one year from the date of the alleged violation, for relief as follows:

- a. With respect to a prospective employee, the court may:
 - (1) Order injunctive relief as it deems appropriate;
 - (2) Order compensatory and consequential damages incurred by the prospective employee as a result of the violation; or
 - (3) Award reasonable attorneys and court costs.
- b. With respect to an employee or former employee, the court may:
 - (1) Order injunctive relief as it deems appropriate, including reinstatement of the employee to the same position held before the violation or the position the employee

would have held but for the violation, as well as the reinstatement of full fringe benefits and seniority rights;

(2) Award compensatory and consequential damages incurred by the employee or former employee as a result of the violation, including compensation for lost wages, benefits and other remuneration; or

(3) Award reasonable attorney's fees and court costs.

34:6B-4 Penalties

Any employer who violates any provision in this Act shall be subject to a civil penalty in an amount not to exceed \$2,000.00 for the first violation and \$5,000.00 for each subsequent violation, collectable by the Commissioner of Labor in a summary proceeding pursuant to the "penalty enforcement law."

Workplace Safety

New Jersey has recently passed the New Jersey Smoke-Free Air Act, effective March 2006, dealing with the control of smoking. The Act has a specific provision smoking in the workplace. The new statute provides as follows:

NJ Stat. Ann. C.26:3D-55 Short title.

1. This act shall be known and may be cited as "New Jersey Smoke-Free Air Act." C.26:3D-56 Findings, declarations relative to smoking in indoor public places, workplaces.

2. The Legislature finds and declares that: tobacco is the leading cause of preventable disease and death in the State and the nation, and tobacco smoke constitutes a substantial health hazard to the nonsmoking majority of the public; it is clearly in the public interest to prohibit smoking in all enclosed indoor places of public access and workplaces.

.26:3D-57 Definition relative to smoking in indoor public places, workplaces.

"Indoor public place" means a structurally enclosed place of business, commerce or other service-related activity, whether publicly or privately owned or operated on a for-

profit or nonprofit basis, which is generally accessible to the public.

“Workplace” means a structurally enclosed location or portion thereof at which a person performs any type of service or labor.

.26:3D-58 Smoking prohibited in indoor public place, workplace.

4.a. Smoking is prohibited in an indoor public place or workplace, except as otherwise provided in this act.

Exceptions

The provisions of this act shall not apply to:

- a. Any cigar bar or cigar lounge.
- b. Any tobacco retail establishment.
- c. Private homes, private residences and private automobiles.
- d. Any casino.
- e. Any casino simulcasting facility.

C.26:3D-61 Signage, requirements.

7.a. The person having control of an indoor public place or workplace shall place in every public entrance to the indoor public place or workplace a sign, which shall be located so as to be clearly visible to the public and shall contain letters or a symbol which contrast in color with the sign, indicating that smoking is prohibited therein.

In *Shimp v. New Jersey Bell Telephone Co.*, 145 N.J. Super. 516, 368 A.2d 408 (N.J. Super. Ct. Ch. Div. 1976) an employee who was allergic to cigarette smoke sought an injunction requiring the employer to prohibit smoking in general working areas. The court held that OSHA did not preempt the "concurrent state power to act either legislatively or judicially under the common law with regard to occupational safety." The action also was not barred by the New Jersey Workmen's Compensation Act. On the merits, the court held that the plaintiff had a common-law right to a safe working environment. The employer was ordered to "provide safe working conditions for plaintiff by restricting the smoking of employees to the non-work area presently used as a lunchroom."

2) Beards

In *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark* male officers in the appellant city's police department were subject to an internal order that required them to shave their beards. Two police officers for the City were both devout Sunni Muslims who were under a religious obligation to grow beards. The department's beard policy made exceptions for medical reasons, but the department refused to make exceptions for religious beliefs. The police officers filed a suit for injunctive relief against the City, the department, the City's police director, and the City's chief of police on the ground that the department's enforcement of the order would violate their rights under the Free Exercise Clause of U.S. Const. Amend. I.

The judgment of the lower Court, which permanently enjoined the department from disciplining the police officers for refusing to shave their beards, was affirmed on appeal. Because the department made secular exemptions and did not offer any substantial justifications for refusing to provide similar treatment for officers who were required to wear beards for religious reasons, the judgment of the lower Court which found the policy in violation of the First Amendment was affirmed.

The Court concluded that the plaintiffs are entitled to a religious exemption since the department already made secular exemptions. If a state creates a mechanism for exemptions, its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent.

In *Equal Employment Opportunity Commission v. Greyhound Lines, Inc.*, 635 F.2d 188 (1980) the employer was found liable under Title VII of the Civil Rights Act of 1964 for adopting a no-beard policy for public contact employees where it had a disparate impact on black males suffering from a skin condition known as "pseudofolliculitis barbae" that required them to shave. In ruling for the EEOC, the District Court found that it had made a prima facie case and that appellant had failed to establish the defense of business necessity. Greyhound sought review and the Third Circuit Court reversed.

The Court held that the EEOC had not made out a prima facie case for disparate impact because it had failed to produce evidence that Greyhound's no-beard policy selected applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants. To the contrary, statistical evidence introduced by Greyhound established the absence of any discriminatory consequences in the application of the no-beard rule to whites; thus the court held that no violation of Title VII based on the disparate impact theory could exist without proof of this proportionate impact on the employer's workforce.

The Court reversed an order of dismissal because to establish a disparate impact case under Title VII, the EEOC had to present much more dermatological information covering both white and black males from a statistical universe large enough to be respectable and it had to show that enforcement of the policy resulted in actual discrimination in the employer's workforce.

If the EEOC had produced sufficient evidence of the dermatologic effects on blacks vs. whites, the Complaint may have been successful.