7.24.03

To: Ford

From: Roger Allen



Cornelia G. Clark
Clerk of Court of Appeals

**NOTICE**

**This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.**

**A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.**

**Appeal No. 02-2024** **Cir. Ct. No. 01-CV-2943**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT IV**

---

SAM'S CLUB, INC.,

PLAINTIFF-RESPONDENT,

v.

MADISON EQUAL OPPORTUNITIES COMMISSION,

DEFENDANT-APPELLANT,

TONYA MAIER,

INTERVENING DEFENDANT-APPELLANT.

---

APPEAL from an order of the circuit court for Dane County: ROBERT DeCHAMBEAU, Judge. *Affirmed.*

Before Vergeront, P.J., Roggensack and Lundsten, JJ.

¶1 VERGERONT, P.J. This appeal concerns the construction and application of the City of Madison's equal opportunity ordinance prohibiting an employer from discharging an employee because of physical appearance. The

Madison Equal Opportunities Commission (MEOC) decided that Sam's Club, Inc. had violated the ordinance when it discharged Tonya Maier because she wore an eyebrow ring to work in violation of the company's dress code. The circuit court reversed that decision, and Maier and MEOC both appeal.

¶2 We conclude that, under either statutory certiorari as provided in WIS. STAT. § 68.13 (2001-02)[1] or under common law certiorari, the circuit court had the authority to review MEOC's Decision and Final Order under the standards for certiorari review. We also conclude that, giving a reasonable construction to the phrase "for a reasonable business purpose" in the dress code exception in the ordinance, a reasonable decision maker could not conclude that Sam's Club's prohibition against facial jewelry did not come within that phrase, regardless of which party had the burden of proof. Accordingly, we affirm.

## BACKGROUND

¶3 Maier worked for Sam's Club in the Madison store as a cashier. Sam's Club discharged her because she wore a ring through her eyebrow to work and this violated its dress code, which provides: "Nose rings or other facial jewelry are not allowed."

¶4 Maier filed a complaint with MEOC alleging that Sam's Club had discriminated against her based on physical appearance in violation of CITY OF MADISON EQUAL OPPORTUNITIES ORDINANCE § 3.23 (MGO § 3.23). MADISON GENERAL ORDINANCE § 3.23 provides:

> Employment Practices. It shall be an unfair discrimination practice and unlawful and hereby prohibited:

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

> (a) For any person or employer individually or in concert with others to fail or refuse to hire or to discharge any individual ... because of such individual's sex, race, religion, color, national origin or ancestry, age, handicap, marital status, source of income, arrest record or conviction record, less than honorable discharge, *physical appearance*, sexual orientation, political beliefs.... (Emphasis added.)

MADISON GENERAL ORDINANCE § 3.23(2)(bb) defines the term "physical appearance":

> Physical appearance means the outward appearance of any person, irrespective of sex, with regard to hair style, beards, manner of dress, weight, height, facial features, or other aspects of appearance. It shall not relate, however, to the requirement of cleanliness, uniforms, or prescribed attire, if and when such requirement is uniformly applied for admittance to a public accommodation or to employees in a business establishment for a reasonable business purpose.

¶5 After an initial determination that there was probable cause to believe that Sam's Club had violated these sections, there was a hearing before an MEOC examiner. At the beginning of the hearing the parties stipulated to the facts that Sam's Club terminated Maier because she wore a loop through an eyebrow and Sam's Club did this pursuant to its dress code policy prohibiting facial jewelry. Maier's counsel explained that in his view this constituted Maier's prima facie case, and Sam's Club proceeded to present evidence from the general manager at the Sam's Club's Madison store and Dr. Sharon Lennon, a professor in the Department of Consumer and Textile Sciences at the University of Ohio.

¶6 The general manager testified that the image Sam's Club tries to present to customers was one of "price conscious[ness]," "focus on the product," "no distractions," and "don't spend any money on frivolous things." He described this image as a "traditional" or "conservative" style of retail. He explained how Sam's Club tried to convey this image through a very spartan, warehouse-type

building and through the dress code for the employees. The dress code, he testified, was intended to convey the image that the employees were working in a warehouse, were neat and clean, and were not flashy in appearance. Sam's Club considers facial piercings new and not consistent with the conservative image it wanted to convey. The general manager explained that facial jewelry does not include earrings, which are permitted.

¶7 Dr. Lennon testified that retailers commonly attempt to convey an image for their businesses and commonly have dress codes for employees so that they are dressed in a manner that is consistent with that image. She had visited Sam's Club in Madison and testified that the store had a "spartan, sparse" appearance, "no visual amenities"; she had also read some of their materials. She opined that the image Sam's Club was trying to create was "conservative," "value for a price." She also opined that nose rings and other facial jewelry were not "conservative," meaning that they were not commonly accepted and not very many people were wearing them. In her opinion, if Sam's Club is attempting to convey a conservative business image, it is good business judgment to require employees not to wear facial jewelry.

¶8 In a written decision and order, the hearing examiner made recommended findings of fact, conclusions of law and an order. The examiner concluded that Maier was a member of "the protected class, physical appearance," that Sam's Club's proffered reason for prohibiting facial jewelry—to preserve a "conservative business image"—did not constitute a "reasonable business purpose" under MGO § 3.23(2)(bb), and that Sam's Club had discriminated against Maier in violation of MGO § 3.23 by discharging her for wearing facial jewelry. The examiner ordered Sam's Club "to cease and desist from discriminating on the basis of physical appearance" and not to retaliate against

Maier for the exercise of her rights, and also ordered that the "matter shall be set for further proceedings to establish damages."

¶9 Sam's Club appealed the examiner's recommended decision and order to MEOC. In a written "Decision and Final Order," MEOC adopted all the examiner's findings of fact, conclusions of law and order. It dismissed Sam's Club's appeal and remanded to the examiner "for further proceedings consistent with this decision." Attached to the decision and order was a "Notice of Right to Appeal Final Order," which stated:

> Attached is the Final Order of the Madison Equal Opportunities Commission (MEOC). If discrimination was found, the Respondent must comply with the Order or the Commission may seek judicial enforcement of the Order as prescribed by Section 3.23(9)(c)3, Madison General Ordinances and/or Respondent may be subject to the penalty described in Section 3.23(12), Madison General Ordinances. If no discrimination was found, the allegations have been dismissed. A Final Order may find discrimination regarding some allegations and no discrimination regarding other allegations.
>
> Either or both parties may seek judicial review of the attached Final Order as provided by Section 68.13 of the Wisconsin Statutes, by common law or by any other available legal remedy. Review of this Order pursuant to Sec. 68.13(1) must be commenced by petition for certiorari in the circuit court for Dane County within 30 days after receipt of this Order.

¶10 Sam's Club appealed to the circuit court, asserting that its appeal was pursuant to WIS. STAT. § 68.13(1) and MGO § 3.23(10)(c)4. These provide:

> **Judicial review. (1)** Any party to a proceeding resulting in a final determination may seek review thereof by certiorari within 30 days of receipt of the final determination. The court may affirm or reverse the final determination, or remand to the decision maker for further proceedings consistent with the court's decision.

WIS. STAT. § 68.13(1).

> All orders of the Equal Opportunities Commission shall be final administrative determinations and shall be subject to review in court as by law may be provided. Any party to the proceeding may seek judicial review thereof within thirty (30) days of service by mail of the final determination. In addition, written notice of any request for judicial review shall be given by the party seeking review to all parties who appeared at the proceeding, with said notice to be sent by first class mail to each party's last known address.

MGO §.3.23(10)(c)4.

¶11 The circuit court granted Maier's motion to intervene. Maier, but not MEOC, asserted that the circuit court did not have authority to review MEOC's Decision and Final Order because Sam's Club invoked WIS. STAT. § 68.13 as the basis for judicial review, not common law certiorari, and WIS. STAT. ch. 68 was limited to the determinations specified in WIS. STAT. § 68.02. This section provides:

> **Determinations reviewable.** The following determinations are reviewable under this chapter:
>
> **(1)** The grant or denial in whole or in part after application of an initial permit, license, right, privilege, or authority, except an alcohol beverage license.
>
> **(2)** The suspension, revocation or nonrenewal of an existing permit, license, right, privilege, or authority, except as provided in s. 68.03(5).
>
> **(3)** The denial of a grant of money or other thing of substantial value under a statute or ordinance prescribing conditions of eligibility for such grant.
>
> **(4)** The imposition of a penalty or sanction upon any person except a municipal employee or officer, other than by a court.

Maier argued that her discrimination complaint fell into none of these four categories.

¶12 The circuit court concluded that, although there appeared to be no statutory provision for review of a municipal agency's decision "that does not include the elements described in 68.02," it was not persuaded there was no common law basis for certiorari review. For that reason, as well as MEOC's lack of objection to judicial review and the court's view that the interests of justice would be served by allowing judicial review, the court decided it had the authority to review MEOC's Decision and Final Order. The circuit court then reversed MEOC's Decision and Final Order because it concluded that MEOC's construction and application of the phrase "reasonable business purpose" was unreasonable.

## DISCUSSION

*Availability of Judicial Review*

¶13 The threshold question is whether the circuit court had the authority to review MEOC's Decision and Final Order. On appeal, Maier argues, as she did in the circuit court, that WIS. STAT. ch. 68 is inapplicable because Maier's complaint does not come within any of the categories of WIS. STAT. § 68.02, which defines the determinations that are governed by that chapter. She objects to review by common law certiorari on two grounds: (1) Sam's Club did not allege in its complaint that it was seeking review by common law certiorari; and (2) common law certiorari is available to review only final determinations and MEOC's Decision and Final Order was not final because there were to be further proceedings on the matter of damages. In the alternative, Maier argues that, if we decide that ch. 68 is applicable, Sam's Club may not seek judicial review now

under WIS. STAT. § 68.13(1) because MEOC's Decision and Final Order is not a "final determination" as required by that provision.[2]

¶14 MEOC joins Maier in arguing that Sam's Club may not seek judicial review now under WIS. STAT. § 68.13(1) because the Decision and Final Order is not a "final determination" within the meaning of that provision. However, as we understand MEOC's position, unlike Maier, MEOC views WIS. STAT. ch. 68 as generally applicable because, once damages are determined, they will constitute a "penalty or sanction" within the meaning of WIS. STAT. § 68.02(4) and thus there will be a "final determination" under § 68.13(1).

¶15 Sam's Club responds that MEOC's Decision and Final Order comes within WIS. STAT. § 68.02(2) because it revokes Sam's Club's right to enforce its dress code, and it comes within § 68.02(4) because it imposes a penalty or sanction in that violation of the order subjects Sam's Club to a forfeiture of between $10 and $500 per day. MGO § 3.23(15). Sam's Club also contends that MEOC's Decision and Final Order is a "final determination" within the meaning of WIS. STAT. § 68.13(1) because it is MEOC's final determination that Sam's Club discriminated against Maier, and because both MGO § 3.23(10)(c)4 and the notice MEOC attached to the Decision and Final Order state that the order is final. However, Sam's Club asserts, if we determine that WIS. STAT. ch. 68 is inapplicable and review is proper by common law certiorari, its complaint is sufficient for that purpose.

¶16 Whether Sam's Club may seek judicial review under WIS. STAT. § 68.13(1) requires construction of a statute, thus presenting a question of law,

[2] Maier made this argument in a footnote in her brief before the circuit court. The circuit court did not address it.

which we review de novo. ***Reyes v. Greatway Ins. Co.***, 227 Wis. 2d 357, 364-65, 597 N.W.2d 687 (1999). Whether a court may review a particular decision of an administrative agency by common law certiorari is also a question of law. ***Vidal v. LIRC***, 2002 WI 72, ¶14, 253 Wis. 2d 426, 435, 645 N.W.2d 870.

¶17 Turning first to the issue of whether WIS. STAT. ch. 68 applies, we bear in mind that the aim of all statutory construction is to discern the intent of the legislature. ***Reyes***, 227 Wis. 2d at 365. To that end, we consider first the language of the statute, and if that clearly and unambiguously sets forth the legislative intent, we apply that language. ***Id.*** In this process, we do not consider disputed language in isolation, but in the context of the entire statute. ***Town of Avon v. Oliver***, 2002 WI App 97, ¶7, 253 Wis. 2d 647, 644 N.W.2d 260.

¶18 Our analysis of WIS. STAT. ch. 68 reveals a number of provisions that lead us to question the chapter's applicability in this case, but which no party addresses. First, WIS. STAT. § 68.001 expressly states the legislature's intent:

> **Legislative purpose.** The purpose of this chapter is to afford a constitutionally sufficient, fair and orderly administrative procedure and review in connection with determinations by municipal authorities which involve constitutionally protected rights of specific persons which are entitled to due process protection under the 14th amendment to the U.S. constitution.

Therefore, WIS. STAT. § 68.02, which lists the specific types of determinations covered by the chapter, must be read in light of the express purpose. However, neither MEOC nor Sam's Club explains why Maier's complaint that Sam's Club violated the ordinance prohibiting discrimination involves a "constitutionally protected right" that is "subject to due process protection," § 68.001, and our own research has not disclosed any case applying ch. 68 to this type of proceeding.

¶19 Second, WIS. STAT. § 68.03(8) excludes from the coverage of the chapter "[a]ny action which is subject to administrative review procedures under an ordinance providing such procedures as defined in s. 68.16." WIS. STAT. § 68.16 provides:

> **Election not to be governed by this chapter.** The governing body of any municipality may elect not to be governed by this chapter in whole or in part by an ordinance or resolution which provides procedures for administrative review of municipal determinations.

The City of Madison has established administrative procedures to decide complaints of violations of its equal opportunity ordinance. MGO § 3.23(10)(c). It has further authorized MEOC to create its own rules for that purpose, MGO § 3.23(10)(b)7, and MEOC have done so. The procedures the City and MEOC have established are not the same as those contained in WIS. STAT. §§ 68.07 through 68.12, although both do contain an evidentiary hearing. *Cf.* WIS. STAT. § 68.11(2) and MGO § 3.23(10)(c)2. Neither MEOC nor Sam's Club addresses why the entirely distinct procedures the City and MEOC have adopted do not constitute an election not to be bound by WIS. STAT. ch. 68 in proceedings on discrimination complaints, even if the chapter might otherwise apply.

¶20 However, if we assume for purposes of discussion that WIS. STAT. ch. 68 does apply to proceedings such as that in Maier's complaint, and also assume that the City has not elected to opt out of the chapter, we nonetheless do not agree with MEOC and Maier that Sam's Club may not seek judicial review under WIS. STAT. § 68.13. In their argument that the MEOC Decision and Final Order is not a "final determination" as provided in § 68.13(1), both MEOC and Maier overlook WIS. STAT. § 68.12, which defines a "final determination":

> **Final determination. (1)** Within 20 days of completion of the hearing conducted under s. 68.11 and the filing of

> briefs, if any, the decision maker shall mail or deliver to the appellant its written determination stating the reasons therefor. Such determination shall be a final determination.
>
> (2) A determination following a hearing substantially meeting the requirements of s. 68.11 or a decision on review under s. 68.09 following such hearing shall also be a final determination.

¶21 Instead, MEOC and Maier rely on cases decided in the context of appeals to this court from the circuit court under WIS. STAT. § 808.03(1). *See, e.g.*, ***Harding v. Kumar***, 2001 WI App 195, ¶10, 247 Wis. 2d 219, 633 N.W.2d 700 (Ct. App. 2001) ("final" as that term is used in § 808.03(1) means a judgment or order that disposes of the entire matter in controversy as to one of the parties; this depends on whether the circuit court contemplated the judgment or order to be final at the time it was entered). We conclude these cases are not applicable in construing WIS. STAT. ch. 68. In WIS. STAT. § 68.12, the legislature has plainly chosen to define "final determination" as the determination resulting from a prescribed process rather than in terms of whether the content of the determination does or does not contemplate further proceedings. The Decision and Final Order issued by MEOC is a written determination stating reasons for the determination issued after a hearing that substantially conforms to the requirements of WIS. STAT. § 68.11.[3] We see no indication in the language of § 68.12, § 68.13, or any other provision of the chapter that MEOC's Decision and Final Order is not a "final determination" within the meaning of § 68.13, assuming that ch. 68 is applicable.

¶22 Alternatively, if we assume for purposes of discussion that WIS. STAT. ch. 68 is not applicable to Maier's complaint, either because it is not

[3] We note that, according to rules adopted by MEOC, the hearing examiner's findings of fact, conclusions of law and order are recommendations that may be appealed to MEOC. MEOC Rule 11.1.

covered under WIS. STAT. § 68.02 when read in light of WIS. STAT. § 68.001, or because the City has elected not to be bound by ch. 68, we do not agree with Maier that common law certiorari is not available. Common law certiorari is available to review legal questions involved in an administrative agency's decision where statutory appeal is not available.[4] ***Franklin v. Housing Auth.***, 155 Wis 2d 419, 424, 455 N.W.2d 668 (Ct. App. 1990). We reject Maier's contention that if a party does not specifically allege in its complaint that it is seeking review by common law certiorari, that method of judicial review is unavailable. Maier asserts that ***Thorp v. Town of Lebanon***, 2000 WI 60, ¶55-56, 235 Wis. 2d 610, 643, 612 N.W.2d 59, supports her position, but we conclude it does not.

¶23 The complaint in ***Thorp*** alleged equal protection and due process claims as a result of that municipality's decision not to rezone the plaintiffs' property. The court concluded the complaint did not state a claim for a violation of procedural due process because the plaintiffs had an adequate post-deprivation remedy available to them—certiorari review under WIS. STAT. § 68.13. The court rejected the Thorps' argument that the complaint they filed commenced a review by writ of certiorari stating:

> In this case, the Thorps alleged that they were denied the right to a fair and impartial hearing, in violation of their procedural due process rights. There is no indication in the complaint that the Thorps sought certiorari review under either the statute or the common law. The complaint neither cited to Wis. Stat. § 68.13, nor did it state that certiorari review was requested. Moreover, the Thorps failed to comply with the requirements of § 68.13 because they did not seek review within 30 days of the final determination.

[4] No party has suggested that there is a statute providing for judicial review of MEOC's Decision and Final Order other than WIS. STAT. § 68.13.

*Id.* at ¶55. The point in ***Thorp*** is that the complaint there did not indicate in any way that the plaintiffs sought either statutory or common law certiorari review of the municipality's decision. In contrast, in this case Sam's Club's complaint plainly sought judicial review of MEOC's Decision and Final Order and it alleged the specific factors for certiorari review as the proper scope of the circuit court's review.[5] It is true the complaint alleged that judicial review was sought under § 68.13(1) and did not mention common law certiorari, but neither ***Thorp*** nor any other case of which we are aware requires that the complaint assert the specific source of certiorari review. MEOC evidently understood that certiorari review was sought, because it filed a return of the record. Maier cannot reasonably argue that she did not have notice that Sam's Club sought judicial review by certiorari: whether § 68.13 or common law certiorari is the proper method for judicial review in this case is a question of law and is not dependent on which of the two Sam's Club asserted in its complaint.

¶24 Maier's second objection to allowing review by common law certiorari is that it is available only to review a final determination of an agency, and MEOC's Decision and Final Order was not final because damages remained to be determined. For this proposition, Maier relies on ***State ex rel. Czapiewski v. Milwaukee Service Commission***, 54 Wis. 2d 535, 539, 196 N.W.2d 742 (1972). However, neither ***Czapiewski*** nor the cases it cites analyze the requirement of finality for common law certiorari review in a way that supports the conclusion that MEOC's Decision and Final Order is not final.

[5] The standards for common law certiorari are the same as for certiorari review provided by statute, unless the statute expands the scope of review, which WIS. STAT. § 68.13 does not. ***Hanlon v. Town of Milton***, 2001 WI 61, ¶23, 235 Wis. 2d 597, 607, 612 N.W.2d 44.

¶25 In ***Czapiewski***, the issue was whether the petition for certiorari review filed within the six months was applicable when no statute defined a time period. This, the court said, depended on when "[the] right to relief accrue[d]." ***Id.*** at 539. The plaintiff argued that he could not have sought review of an order suspending him until he obtained a medical clearance because, he argued, the suspension might have been lifted based on the medical clearance. ***Id.*** at 540. The court agreed with the plaintiff that "[c]ertiorari ... lies only to review a final determination...," ***id.*** at 539, but concluded that the order was final because the grounds on which the plaintiff alleged the order should be set aside existed on the date the order was entered and nothing happened after the order was entered to change those grounds. ***Id.*** at 540. Maier cites only the court's statement that "[c]ertiorari ... lies only to review a final determination," ***id.*** at 539, and does not develop the argument by applying the reasoning of ***Czapiewski*** to this case. In our view, that reasoning may well support Sam's Club's position in this case. Nothing was to occur or did occur after the date of MEOC's Decision and Final Order to alter the grounds upon which Sam's Club seeks judicial review: that MEOC erred in its determination that Sam's Club discriminated against Maier based on personal appearance.

¶26 Although Maier does not refer to them, we have also read the cases the court in ***Czapiewski*** cites for the proposition that "[c]ertiorari ... lies only to review a final determination." ***Id.*** at 539. In each case, the administrative action held not final for purposes of certiorari review bears no resemblance to MEOC's Decision and Final Order. ***McKenzie v. Brown***, 174 Wis. 498, 182 N.W. 602, 604 (1921) (no determination had yet been made by the superintendent); ***Meissner v. O'Brien***, 208 Wis. 502, 243 N.W. 314 (1932) (review sought of a ruling on an objection to the authority of the hearing officer before the hearing was concluded);

*St Mary's Hosp. v. Indus. Comm'n*, 250 Wis. 516, 518, 27 N.W.2d 478 (1947) (review sought of a ruling on the relevancy of evidence before the hearing was concluded). In this case, in contrast, the administrative hearing was concluded, the examiner issued a written decision concluding that Sam's Club had discriminated against Maier based on physical appearance by terminating her because of her eyebrow ring and ordered Sam's Club to cease discriminating; MEOC adopted that decision and order in a document entitled Decision and Final Order; and MEOC attached to that document a notice advising Sam's Club that the "Final Order of the MEOC" was attached.

¶27 In her argument that common law certiorari review is not available because MEOC's Decision and Final Order is not final, Maier also points to the cases we have referred to above governing appeals to this court under WIS. STAT. § 808.03(1). However, she does not develop an argument relating our construction and application of that statute to the case law discussing the purposes of common law certiorari. Particularly in view of the statutory method available for seeking permissive review of non-final circuit court orders in this court, *see* § 808.03(2), it is not at all self-evident that our construction of the term "final" as used in § 808.03(1) should define the availability of common law certiorari review of agency actions.

¶28 In short, Maier has not presented us with persuasive authority for her argument that the MEOC's Decision and Final Order is not final for purposes of common law certiorari review.

¶29 Accordingly, we conclude that, under either statutory certiorari as provided in WIS. STAT. § 68.13 or under common law certiorari, the circuit court

had the authority to review MEOC's Decision and Final Order under the standards for certiorari review.[6]

*Construction and Application of MGO § 3.23(2)(bb)*

¶30 On an appeal from a circuit court's decision reviewing the decision of an administrative agency, we apply the same standard as the circuit court and do not defer to the circuit court. ***City News & Novelty, Inc. v. City of Waukesha***, 231 Wis. 2d 93, 102, 604 N.W.2d 870 (Ct. App. 1999). Because this is a certiorari review of MEOC's Decision and Final Order, we, like the circuit court, are limited to determining whether: (1) MEOC kept within its jurisdiction; (2) MEOC acted according to law; (3) MEOC acted in an arbitrary manner that represented its will and not its reasoned judgment; and (4) the record contains evidence such that MEOC might reasonably make the Decision and Final Order. *See* ***Klinger v. Oneida County***, 149 Wis. 2d 838, 843, 440 N.W.2d 348 (1989).

¶31 Sam's Club challenges MEOC's construction of MGO § 3.23(2)(bb), contending that MEOC erred in placing the burden on Sam's Club to prove it had a "reasonable business purpose" for prohibiting eyebrow rings and erred in the construction and application of the phrase "reasonable business purpose." These challenges implicate the second and third factors above.

¶32 The construction of an ordinance, like the construction of a statute, presents a question of law, and we apply the rules of statutory construction. ***Schroeder v. Dane County Bd. of Adjustment***, 228 Wis. 2d 324, 333, 596 N.W.2d

[6] We recognize it is unusual not to decide whether WIS. STAT. ch. 68 applies, but instead to assume both that it does and that it does not and to address the objections under each scenario. We choose this course because there are important issues concerning the applicability of ch. 68 that have not been briefed or argued.

472 (Ct. App.1999). Although we are not bound by an administrative agency's conclusion of law, we may accord it deference. ***UFE, Inc. v. LIRC***, 201 Wis. 2d 274, 284, 548 N.W.2d 57, 61 (1996). We give great weight deference only when:

> (1) the agency was charged by the legislature with the duty of administering the statute; (2) ... the interpretation of the agency is one of long-standing; (3) ... the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) .... The agency's interpretation will provide uniformity and consistency in the application of the statute.

***Id.*** at 284. When we accord great weight deference, we uphold the agency's construction if it is not contrary to the clear language of the ordinance, even if another interpretation is more reasonable. ***Id.*** at 287. We give a lesser amount of deference—due weight—when the agency has some experience in the area, but has not developed the expertise that necessarily places it in a better position than the court to make judgments regarding the interpretation of the statute. ***Id.*** at 286. Under this standard, if the agency's construction is reasonable, we uphold it unless there is a more reasonable construction. ***Id.*** at 287. Finally, we give no deference to the agency and review the issue de novo when the issue before the agency is one of first impression or the agency's position has been so inconsistent as to provide no real guidance. ***Id.*** at 285.

a. *Burden of proof on the exception.*

¶33 We consider first the question of where the burden of proof lies on the issue of whether a requirement of cleanliness, uniforms, or prescribed attire is "for a reasonable business purpose." In MEOC's decision, it placed the burden on the employer to prove "a legitimate, nondiscriminatory reasonable business purpose for the no-facial jewelry policy." In their briefs, both MEOC and Maier contend that this is correct because, they assert, the exception in MGO

§ 3.23(2)(bb) for a requirement of cleanliness, uniforms, or prescribed attire is an affirmative defense. They also contend that MEOC's construction of the ordinance on this point is entitled to great weight deference. Sam's Club responds that the claimant must prove the exception does not apply as part of her case and that MEOC's decision on this point is inconsistent with prior decisions and therefore entitled to no deference.

¶34 For the reasons we explain later in this decision, we conclude it is not necessary to decide whether Maier must prove as an element of her claim that the exception to the definition of physical appearance does not apply or Sam's Club must prove it does apply. However, because the parties have argued at length whether MEOC decisions have been consistent on this point, and because it may be of assistance, we choose to take up the issue of whether MEOC's decisions have been consistent on this question. We conclude they have not been consistent.

¶35 In the first MEOC decision brought to our attention, ***Marks v. Rennebohm Drug Stores, Inc.***, MEOC Decision (October 29, 1975), MEOC appears to have required the employer to prove a "reasonable business purpose," because it found that the employer "had not demonstrated 'a reasonable business purpose' for the hair length rule or for the denial of the Complainant's request to wear a hair net." However, MEOC's subsequent complaint against Rennebohm Drug Stores concerning that same employee was dismissed because, the circuit court ruled, under the language of MGO § 3.23(2)(bb) (then numbered MGO § 3.23(2)(k)), the plaintiff had to plead and prove that the employer's conduct did not come within the exception stated in the definition of physical appearance. ***City of Madison v. Rennebohm Drug Stores, Inc.***, CV179P319 (Dane County Ct.,

July 19, 1977).[7] The court dismissed the complaint because the facts alleged were insufficient to state a cause of action under this construction of the ordinance. This construction of the ordinance apparently has never been applied by MEOC and is, indeed, the construction that Sam's Club advocates.

¶36 Subsequently in ***Karaffa v. McDonald's Restaurant***, MEOC Final Order, Case No. 2752 (April 15, 1982), MEOC adopted the hearing examiner's decision that the burden of proof is the same as that established in ***Texas Department of Community Affairs v. Burdine***, 450 U.S. 248 (1981), a Title VII sex discrimination case. Under this approach, once the employee has established a prima facie case of discrimination, the employer has the burden of articulating a legitimate nondiscriminatory reason for its allegedly unlawful actions, which must be legally sufficient and supported by admissible evidence, but need not persuade the decision maker; if the employer does so, the employee then has the burden of persuasion that the articulated reason is pretextual or unworthy of credence. ***Id.*** at 254-56. Applying this approach, MEOC decided that McDonald's no-beard rule constituted discrimination based on physical appearance because its asserted concerns of health and safety and a public image of cleanliness were pretextual. ***Karaffa***, MEOC Final Order, Case No. 2752. The circuit court reversed this decision, and this court affirmed. ***State ex rel. McDonald's Restaurant v. MEOC***, 82-CV-2423 (Dane County Cir. Ct., July 6, 1983) ***aff'd*** 83-1571 (Ct. App.,

[7] It is not clear from the court's decision in ***City of Madison v. Rennebohm Drug Stores, Inc.***, City Docket CV179P319 (Dane County Ct., July 19, 1977), why MEOC was initiating an action against Rennebohm Drug Stores, or the precise procedural relationship of the court action to MEOC's October 29, 1975 decision in favor of the employee. However, the title of the court's decision, as identified in the MEOC Digest, indicates the complaint in court concerned the same employee involved in MEOC's decision against Rennebohm Drug Stores.

August 23, 1984).[8] Both courts observed that the MEOC urged application of the ***Burdine*** approach and both applied that approach. However, the ***Burdine*** burden-shifting approach is inconsistent with placing the burden on the employer to prove a reasonable business purpose as an affirmative defense: under ***Burdine***, the employer need only present some evidence of a reasonable business purpose, and the employee then has the burden to persuade the decision maker that purpose is pretextual or unworthy of credence. ***Burdine***, 450 at 256.

¶37 MEOC also applied the ***Burdine*** burden-shifting approach in ***Quinn-Gruber v. Wisconsin Physicians Service***, MEOC Case No. 2877 (January 27 1983). There the hearing examiner's recommended decision was that a dress code prohibiting "too long" skirts discriminated based on physical appearance because it was vague and because the employer had presented no evidence to justify its articulated business purpose of safety; the hearing examiner's decision in essence required the employer to prove that its conduct fell within the exception. However, MEOC opined that the employer's articulation of safety was sufficient under ***Burdine*** and the complainant had not carried her burden of proving it was pretextual.[9]

---

[8] The court of appeals decision, unlike the circuit court, did not reach the issue of public image because it concluded the health and safety concerns alone constituted a "reasonable business purpose." ***State ex rel. McDonald's Restaurant v. MEOC***, 83-1571 (Ct. App., Aug. 23, 1984).

[9] MEOC also refers to two other decisions that we do not view as helpful in evaluating its past construction and application of MGO § 3.23(2)(bb) regarding which party has the burden of proof on the exception. ***Maxwell v. Union Cab Coop.***, MEOC Case No. 21028 (July 10, 1992) (reversing the examiner's conclusion that the complainant failed to prove his employer had discriminated against him based on physical appearance but not explaining reversal with reference to the exception); and ***Kessler v. Federated Rural Electric Ins. Co.***, MEOC Case. No. 2337 (March 10, 1983) (reversing examiner's conclusion that employer discriminated based on physical appearance because it determined the complainant's physical appearance was not a substantial factor in his discharge).

¶38 In this case, the decision adopted by MEOC explained that, although MEOC "has often utilized the ***Burdine-McDonnell-Douglas*** burden-shifting approach in employment discrimination cases," it did not need to be followed when, as here, the parties had "address[ed] the ultimate question of discrimination." In their briefs, MEOC and Maier argue that the ***Burdine*** burden-shifting approach applies only when the employer has denied that it has made an employment decision on a prohibited basis and does not apply when, as here, there is no dispute over the reason for the termination. Maier also argues that under federal case law, this approach has no relevance after a case proceeds to trial. These may well be valid reasons for not applying the ***Burdine*** burden-shifting approach in cases of this type, but they do not alter the fact that MEOC has followed that approach in the past in cases where, as here, the employer has admittedly terminated an employee because of failure to comply with a requirement concerning cleanliness or personal attire, and the parties have fully tried the issues. Neither MEOC nor Maier appears to recognize that the premise of the ***Burdine*** burden-shifting approach is that the complainant has the burden of persuasion to disprove the employer's articulated "reasonable business purpose," a premise that is irreconcilable with treating a "reasonable business purpose" as an affirmative defense that the employer must prove.[10]

¶39 We also observe that the MEOC Digest adds to the confusion on this issue. The MEOC Digest states:

[10] It is also true that Sam's Club advocates both the ***Burdine*** burden-shifting approach and construing the ordinance such that the complainant must prove as an element of his or her case that the exception does not apply. These, too, are inconsistent arguments. In the latter situation, if the complainant does not put on evidence that the exception does not apply, the employer is entitled to dismissal at the close of the complainant's case; the employer need not put on evidence to show the exception is applicable unless the complainant has first presented evidence that it is not.

> **612.3 Respondent's Burden to Articulate Legitimate, Non-Discriminatory Reason.** An employer need only articulate reasons why its regulation of employee's physical appearance meets the exception specified in the Ordinance for "reasonable business purpose"; the employee must then prove that those reasons are invalid. ***State ex rel. McDonald's Restaurant v. MEOC (Karaffa)***, supra [82-CV-2423 (Dane County Circuit Court, July 6, 1983) aff'd 83-1571 (Ct App August 23, 1984)]; also ***City of Madison v. Rennebohm Drug Stores (Marks)***, CV179P319 (Dane County Cir. Ct., 7/19/77).

As our discussion of these cases already indicates, the sentence preceding the case citations is an accurate summary of ***McDonald's*** but not of ***Rennebohm Drug Stores***, and the two cases are inconsistent.[11]

b. *Construction and application of "for a reasonable business purpose."*

¶40 In its decision, MEOC stated that an employer's desire to convey a particular image could in certain circumstances constitute "a reasonable business purpose" for a dress code, but it determined Sam's Club's purpose of conveying a conservative image was not "a reasonable business purpose" within the meaning of MGO § 3.23(2)(bb) for three reasons: (1) a conservative image is based on Sam's Club's idea of what consumer's will find pleasing in an employee's appearance, and this is not acceptable for employment policies; (2) the traits that constitute a conservative image vary based on geography and setting, and cannot

[11] We recognize that the Introduction to the MEOC Digest cautions the reader that "the case summaries are not intended as official EOC interpretations," but rather as "a guide for directing the reader to the full text of pertinent cases." However, the Introduction also states that it is intended to "assist the public in general and the legal practitioner in particular" and "[i]n addition to being useful in the hearing and settlement processes, it is also intended to assist in the prevention of discriminatory practices." It is, in any event, confusing when the digest does not accurately summarize a case, as with ***Rennebohm Drug Stores***, or summarizes cases it does not follow without indicating this, as with both ***Rennebohm Drug Stores*** and ***McDonald's***.

be defined with certainty; and (3) Sam's Club is a general retailer, not an office.[12] Sam's Club contends that these reasons are based on an erroneous construction of "reasonable business purpose." MEOC and Maier assert that we should give great weight deference to MEOC's construction, while Sam's Club contends it is inconsistent with MEOC's prior decision in ***Quinn-Gruber*** and, therefore, we should accord it no deference.

¶41 We begin by reviewing MEOC's prior decisions to determine the appropriate level of deference. MEOC has addressed whether a requirement of cleanliness, uniforms, or prescribed attire is for a reasonable business purpose in ***Marks***, ***Karaffa***, and ***Quinn-Gruber***. However, MEOC's decision in ***Marks*** is of questionable validity after the court's dismissal of its complaint in ***Rennebohm Drug Stores*** and MEOC's decision in ***Karaffa*** was reversed by the circuit court, with this court affirming that reversal. It is true that these court decisions are not binding in other MEOC cases, but they do mean that MEOC's decisions in these two cases may not be relied on to show a consistent and long-standing history in construing for "a reasonable business purpose."

¶42 In ***Quinn-Gruber***, in addition to concluding that the employer had discriminated against the employee based on physical appearance because of the prohibition against "too long" skirts, the hearing examiner also upheld another aspect of the dress code. The examiner concluded that a dress code prohibiting jeans and tennis shoes, which the employer stated was for the purpose of "business image or public image" was proper, if applied in a uniform manner, "in an office

[12] Certain sentences of the decision suggest that a "reasonable business purpose" is limited to considerations of health and safety. However, at oral argument, MEOC counsel stated the decision does not say that, and we accept counsel's reading as the more reasonable reading of the decision. For purposes of clarity, however, we state that such a limitation on the meaning of "reasonable business purpose" would be an unreasonable construction of the phrase.

setting where there is even minimal public contact, regardless of whether or not the wearing of those items of clothing physically interferes with a person's ability to do their job." MECO Case No. 2877 at 12-13 (footnote omitted). MEOC, as we have noted above, disagreed with the examiner's recommended decision on the "too long" skirts prohibition and so vacated the conclusion that there was discrimination; however, it remanded for further proceedings on the issue of whether the employer had applied the "too long" skirts prohibition to retaliate against the employee for opposing allegedly discriminatory practices.

¶43 In MEOC's decision in this case, MEOC rejected Sam's Club's argument that its decision in ***Quinn-Gruber*** was authority for the proposition that a business image was a reasonable business purpose when an employee has public contact on two grounds: (1) MEOC in ***Quinn-Gruber*** vacated the hearing examiner's conclusion of discrimination, and (2) the scope of the decision was limited to an office setting and did not apply to a general retailer. On this appeal, Maier, but not MEOC, advances the position that in ***Quinn-Gruber*** MEOC did not endorse the examiner's conclusion on business image because it vacated the entire decision and remanded. If Maier is correct, then MEOC's decision in ***Quinn-Gruber*** does not contribute much, if anything, to a history of MEOC's construction and application of "for a reasonable business purpose." However, we think the more reasonable reading of MEOC's decision in ***Quinn-Gruber*** is that, by commenting only on its disagreement with the examiner's conclusion regarding the "too long" skirts prohibition and remanding only for the purpose of determining if that were applied in a discriminatory manner, MEOC was, of necessity, agreeing with the hearing examiner's analysis of the tennis shoes and jeans prohibition—otherwise it would have concluded there was discrimination

based on personal appearance because a business image was not a "reasonable business purpose," and there would have been no reason for a remand.

¶44 Maier directs us to two additional decisions as an indication of MEOC's consistent and longstanding construction of "for a reasonable business purpose": ***Regan v. Lyons Mortgage Co.***, MEOC Case No. 20846 (Jan. 31, 1989), and ***Maxwell v. Union Cab Coop.***, MEOC Case No. 21028 (July 10, 1992). The former is the decision of a hearing examiner ordering a remedy after finding an employer liable for discrimination based on physical appearance as a result of default and contains no discussion of the liability issue. The latter is an MEOC decision reversing the examiner and finding evidence of discrimination based on physical appearance; MEOC identifies the evidence it is relying on—references to the male employee's jewelry and make-up—but does not discuss "for a reasonable business purpose" at all.

¶45 We conclude that, although MEOC has construed and applied "for a reasonable business purpose" before this case, its unreversed decisions are not sufficiently explained and consistent to warrant great weight deference. On the other hand, because it has acquired some experience in deciding these cases and because we cannot say its decisions are so inconsistent as to provide no guidance, we conclude that due weight deference is appropriate. We therefore next consider whether MEOC's construction of "for a reasonable business purpose" is at least as reasonable as any other construction of this phrase, which requires first that we decide whether it is a reasonable construction.

¶46 The language of this phrase imposes three distinct conditions on "requirement of cleanliness, uniforms, or prescribed attire": (1) the employer must have a business purpose; (2) the business purpose must be reasonable; and

(3) the requirements must be "for" that reasonable business purpose. Beginning with the first condition, we conclude that a "business purpose" is an unambiguous term that means "a goal of benefiting the business." The word "reasonable" is a modification of "business purpose," and means, we conclude, that the business purpose must be that of a reasonable business person. Finally, the challenged requirement of cleanliness, uniforms, or prescribed attire must be "for" that reasonable business purpose, which plainly means that the requirement is intended to further the purpose.

¶47 Turning now to MEOC's construction of the phrase, we analyze each of the three reasons to determine whether they are based on reasonable constructions of the phrase. We conclude that none are.

¶48 First, we consider MEOC's exclusion of customer preferences for types of attire from "reasonable business purpose." The meaning of "business purpose" is broad, and plainly includes attracting and maintaining customers to one's business, which just as plainly depends upon customer preferences and customer satisfaction. In deciding this is not a "reasonable" business purpose, the MEOC decision relies on case law concluding that customer preferences do not justify employment practices that are themselves prohibited practices. *See, e.g.*, ***Gerdon v. Continental Airlines, Inc.***, 692 F.2d 602, 609 (9th Cir. 1982) (employer whose weight limit for female flight attendants is prohibited sex discrimination may not justify the weight limit by customer preference for slender female flight attendants).[13] However, under Madison's ordinance, discrimination

[13] The court in ***Gerdon v. Continental Airlines, Inc.***, 692 F.2d 602, 607 (9th Cir. 1982), also noted the agreement among federal courts that grooming rules for male and female employees were permissible if they did not significantly deprive either sex of employment opportunities and were even handedly applied to both sexes.

based on physical appearance does not include employment practices based on requirements of cleanliness, uniforms, and prescribed attire that are uniformly applied and are for reasonable business purposes. Therefore, if such requirements meet those two conditions, there is no prohibited practice. It is circular logic—that is, not logical, —to exclude customer preferences for certain types of employee attire from "reasonable business purpose" on the ground that otherwise employers will be engaging in the prohibited practice of employment discrimination based on physical appearance.

¶49 Next, we consider the requirement that the image an employer wants to project for his or her business must have a fixed content in order to be a reasonable business purpose. The fact that what is "conservative" and what is "trendy" varies based on the type of business and its geographical location and cannot be defined with precision has no rational connection to whether it is a reasonable business purpose for an employer to promote an image of "conservative" or "trendy." All it means is that the dress codes and other steps an employer takes to convey a particular image will vary depending on the type of business, where it is, and, perhaps, the particular employer.

¶50 Finally, we consider MEOC's distinction between a business image for a general retailer and for a business in an office setting. Beyond explaining that ***Quinn-Gruber*** concerned business image as a reasonable business purpose in an office setting, MEOC does not in its decision explain why it is not a reasonable business purpose for a general retailer to convey a particular image of its business. We can discern no rational basis for this distinction. As we have mentioned above, the image of its business an employer chooses to convey and how it chooses to convey that image may vary depending on the type of business, but that

variation has no bearing on whether conveying the image the employer chooses is a reasonable business purpose.

¶51 In short, MEOC's construction of "for a reasonable business purpose" imposes limitations on that phrase that are not reasonably conveyed by the language. We therefore do not adopt it. Instead, we adopt the construction of the phrase that we have stated above: A requirement of cleanliness, uniforms, or prescribed attire is "for a reasonable business purpose" when it is intended to further a goal that benefits the business, so long as the goal is that of a reasonable business person.[14]

¶52 Applying this construction of the phrase, we conclude that no reasonable decision maker could determine that the evidence did not establish that the prohibition against eyebrow rings was "for a reasonable business purpose." Accordingly, there is no need to remand to the MEOC. For the same reason, as we indicated earlier, it is not significant in evaluating the evidence whether Maier had the burden of proving the exception did not apply or Sam's Club had the burden of proving that it did apply. The undisputed testimony is that Sam's Club attempts to project and does project a conservative, no frills, no flash image for its business; it does so because Sam's Club wants to convey to customers that they are getting the best value for their money. The testimony is also undisputed that retailers commonly develop images for the benefit of their businesses and commonly have dress codes to further the chosen image. Finally, it is undisputed

[14] In construing this section of the ordinance, we are not considering the constitutionality of this or any other construction. Sam's Club raised certain constitutional challenges in its amended answer to Maier's complaint, but it is not pursuing those on this appeal and apparently did not do so in the circuit court.

that facial jewelry and eyebrow rings in particular do not convey a conservative image.[15]

¶53 Maier argues that there are inconsistencies in Sam's Club's dress code. For example, tattoos are not prohibited nor is orange hair, and multiple earrings are allowed; yet, Maier asserts, none of these convey a conservative image. We do not see the relevancy of this evidence. The issue is whether the prohibition against facial jewelry, which was the basis for Maier's termination, is "for a reasonable business purpose." Conceivably, evidence that other types of attire are allowed that are not conservative could raise a factual issue whether Sam's Club did have the purpose of conveying a conservative image; however, the fact finder in this case implicitly found that this was Sam's Club's purpose and the record supports this implicit finding.

¶54 Maier also argues that if we do not uphold MEOC's construction of "for a reasonable business purpose," the entire prohibition against hiring and firing based on physical appearance will be undermined. This argument overlooks the wording of MGO § 3.23(2)(bb): the exception applies only to "the requirement of cleanliness, uniforms and prescribed attire."

¶55 In summary, we conclude that, giving a reasonable construction to the phrase "for a reasonable business purpose," a reasonable decision maker could not conclude that Sam's Club's prohibition against facial jewelry did not come within that phrase, regardless of which party had the burden of proof.

[15] In evaluating the evidence presented in this case, we do not suggest that it is necessary that an expert testify in order to establish that a requirement of cleanliness, uniforms, or prescribed attire is "for a reasonable business purpose."

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports.

**STATE OF WISCONSIN**

**CIRCUIT COURT**
**BRANCH 1**

**DANE COUNTY**

| | |
|---|---|
| SAM'S CLUB, INC.<br><br>Defendant/Plaintiff,<br><br>vs.<br><br>MADISON EQUAL OPPORTUNITIES COMMISSION,<br><br>Defendant,<br><br>and<br><br>TONYA MAIER,<br><br>Complainant/Intervening Defendant. | MEMORANDUM DECISION AND ORDER<br><br>Case No. 01CV2943 |

**JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY DECISION**

---

Sam's Club, Inc. (Sam's Club) seeks judicial review of an October 1, 2001 decision by the Madison Equal Opportunities Commission (MEOC). Sam's Club terminated employee Tonya Maier because she refused to abide by Sam's Club's dress code, which prohibited wearing facial jewelry, in this case an eyebrow ring. The MEOC found that Sam's Club thereby discriminated against Maier on the basis of her physical appearance, in violation of Madison General Ordinance (MGO) §§ 3.23(8)(a) and 3.23(2)(aa).

This court concludes that the MEOC acted contrary to law, exercising its will and not its judgment when it found Sam's Club's articulated reason for not allowing its employees to wear facial jewelry, i.e., its desire to project and maintain a conservative business image, not a "reasonable business purpose" under MGO § 3.23(2)(aa). The court therefore reverses the MEOC's decision and hereby dismisses Maier's complaint.

**BACKGROUND**

The facts here are simple and undisputed. On November 4, 1999, at the Sam's Club located in Madison, general manager David Hill terminated Maier because she came to work wearing an eyebrow ring and refused to take it out in order to check in. Even though Sam's Club's dress code specifically prohibited the wearing of facial jewelry, Hill had previously allowed Maier to wear the ring if she covered it with a bandaid.

However, when two other employees showed up for work sporting various facial jewelry, Hill decided he would have to enforce the dress code more strictly. Hill therefore told all three employees they would have to remove the jewelry during work hours or face termination for failing to comply with the dress code. All three refused to remove their facial jewelry. Hill fired Maier. The other two tendered their resignations.

Maier subsequently filed a complaint with the MEOC which came on for hearing on August 24, 2000. The parties stipulated to the fact that Sam's Club had terminated Maier because she wore an eyebrow ring in violation of Sam's Club's dress code policy against facial jewelry. The parties also agreed to a bifurcated hearing to first

determine whether discrimination had occurred, and if so, then to determine damages. Thus, the apparent issues for hearing were 1) whether wearing facial jewelry placed Maier in the protected class of "physical appearance" for purposes of MGO § 3.23(8)(a)[1]; and 2) whether Sam's Club's desire to maintain a conservative business image, which precluded allowing its employees to wear facial jewelry, constitutes a "reasonable business purpose" under MGO § 3.23(2)(aa).[2]

On March 30, 2001, the MEOC's hearing examiner (HE) issued his decision and order. The HE found that Maier's firing for having worn an eyebrow ring placed her in the protected class of physical appearance under § 3.23(8)(a). The HE further concluded that Sam's Club's desire to maintain a conservative business image did not constitute a reasonable business purpose within the terms of § 3.23(2)(aa). Thus, having made those two determinations, the HE ultimately found that Sam's Club unlawfully discriminated against Maier when it terminated her for wearing an eyebrow ring.

Sam's Club appealed the HE's decision to the MEOC. On October 1, 2001, the MEOC adopted the HE's decision and order in its entirety, remanding the matter to the HE for proceedings regarding damages.

On October 26, 2001, Sam's Club filed the instant action naming the MEOC as sole defendant. However, on January 17, 2002, this court granted Maier's motion to intervene by its authority under Wis. Stat. § 803.09(2). In addition, on April 23, 2002, the court denied Maier's motion to strike those portions of Sam's Club's briefs referencing unpublished court of appeals decisions, and to strike the same from the "Index of MEOC Decisions and Related Cases" filed by Sam's Club with its briefs. The court determined that Sam's Club's references to such cases were for informational purposes only, and not cited as precedent.

The court now renders its opinion. Further facts will be set forth herein as necessary.

**COURT'S JURISDICTION TO DECIDE THIS CASE**

Sam's Club requested review under Wis. Stat. § 68.13(1), which provides for judicial review of municipal administrative decisions. Maier contends that Wis. Stat. ch.68 does not contemplate such review of the particular type of municipal agency decision involved herein. Maier thus claims, given Sam's Club's exclusive citation to that statutory scheme for purposes of this court's authority,[3] the court is without subject matter jurisdiction to hear this matter. The court acknowledges that Wis. Stat. ch. 68 does not clearly provide for certiorari review of the MEOC's decision. Wis.. Stat. § 68.13(1) states

> "[a]ny party to a proceeding resulting in a final determination may seek review thereof by certiorari within 30 days of receipt of the final determination. The court may affirm or reverse the final determination or remand to the decision maker for further proceedings consistent with the court's decision[,]"

but § 68.02 provides

> **"Determinations reviewable.** The following determinations are reviewable under this chapter:
>
> (1) The grant or denial in whole or in part after application of an initial permit, license, right, privilege, or authority, except an alcohol beverage license.
>
> (2) The suspension, revocation or nonrenewal of an existing permit, license, right, privilege, or authority, except as provided in s. 68.03(5).
>
> (3) The denial of a grant of money or other thing of substantial value under a statute or ordinance prescribing conditions of eligibility for such grant.
>
> (4) The imposition of a penalty or sanction upon any person except a municipal employe or officer, other than by a court."

Thus, there appears to be no statutory provision for judicial review of a municipal agency's decision that does not include the elements described in § 68.02.

However, the court does not agree with Maier's conclusion. First, Maier offers no legal authority for her theory other than the words of the statutes quoted above. Second, the MEOC does not object to the court's jurisdiction, which fact the court deems significant. Finally, the court finds that the interests of justice are served by allowing for certiorari review, whether statutory or common-law decisions by a municipal agency such as the MEOC. The court thereby continues the tradition established by at least Dane County Judges Bardwell and Jones in so doing.[4]

**SCOPE AND STANDARD OF REVIEW**

A certiorari court is limited to determining 1) whether the administrative agency stayed within its jurisdiction; 2) whether it acted according to law; 3) whether its actions were arbitrary, oppressive or unreasonable, representing an exercise of its will rather than its judgment; and 4) whether the evidence was such that it might reasonably decide as it did. Federated Rural Electric Insurance Co. v. Kessler, MEOC, and the City of Madison, 131 Wis. 2d 189, 205-06, 388 N.W.2d 553 (1986).

Determining whether an agency, in this case the MEOC, acted according to law requires the court to construe MGO §§ 3.23(8)(a) and 3.23(2)(aa) and apply those ordinances to the facts. *Id.*, at 206. The question of whether the facts of a particular case fulfill a particular legal standard presents a question of law. *Id.* Given that the parties here stipulated to the underlying facts, the issues before the HE and the MEOC were purely legal.

A certiorari court generally accords an agency's interpretations of law some level of deference. UFE, Inc. v. LIRC, 201 Wis. 2d 274, 284, 548 N.W.2d 57 (1996). Varying levels of deference apply depending upon the relative capabilities of the agency and the reviewing court for interpreting the particular statutes, rules, or as in this case ordinances, at issue. *Id.* However, regardless what level of deference should apply, a reviewing court is not bound by the agency's conclusions if they are unreasonable. Morris v. Employee Trust Funds Bd., 203 Wis. 2d 172, 186-187, 554 N.W.2d 205 (Ct. App. 1996).

An agency's interpretation of law is unreasonable if it directly contravenes the words of the statutes or rules involved, it is clearly contrary to legislative intent, or it is without rational basis. Harnischfeger Corp. v. LIRC, 196 Wis. 2d 650, 662, 539 N.W.2d 98 (1995). Where a statute or ordinance is ambiguous, the agency by definition cannot directly contravene the ordinance's words. *Id.* However, that the agency's interpretation does not directly contravene the words of an ordinance does not necessarily protect that interpretation from unreasonableness. *Id.,* at n.5.

The court has not been able to find case law explaining how or when an agency's interpretation of law should be deemed lacking a rational basis. However, an agency's decision is considered *reasonable* if

> "... it accords with the language of the [ordinance], the [ordinance's] legislative history, and the legislative intent; if the interpretation is consistent with the constitution, the [ordinance] read as a whole, and the purpose of the [ordinance]; and if the interpretation is consistent with judicial analyses of the [ordinance]."

Lisney v. LIRC, 171 Wis. 2d 499, 507, 493 N.E.2d 14 (1992).

**ANALYSIS AND DECISION**

The parties spend a great deal of their briefs arguing about whether the HE properly applied the Burdine-McDonnell Douglas[5] burden-shifting approach commonly used for analyzing employment discrimination cases. However, the court finds it unnecessary to address that question. As the court noted earlier in this opinion, there were really only two issues before the HE to decide, both of them legal, with the ultimate question of discrimination contingent upon the answers to those two questions. The Burdine-McDonnell Douglas approach deals with how factual evidence of discrimination is presented, which does not apply in this situation because the parties stipulated to the facts.

> The HE's decision hinged on how he answered the following two questions:
>
> 1) whether wearing facial jewelry placed Maier in the protected class of "physical appearance" for purposes of MGO § 3.23(8)(a); and
>
> 2) if Maier was in the protected class, whether Sam's Club's desire to maintain a conservative business image, prohibiting its employees from wearing facial jewelry, constitutes a "reasonable business purpose" under MGO § 3.23(2)(aa).

Because the HE "accept[ed] that facial jewelry falls within the 'other aspects of appearance' portion of the physical appearance definition" of § 3.23(8)(a), and concluded that "the articulated business purpose of a conservative image does not form a reasonable business purpose for [] purposes of the ordinance," he also concluded that Sam's Club had discriminated against Maier when it fired her for wearing an eyebrow ring.

The meaning of the phrase "other aspects of appearance," when considered in combination with all the specific aspects of physical appearance enumerated in the ordinance is not clear to this court. The court therefore assumes without deciding that the HE 's interpretation of that phrase is correct. It is the HE's interpretation of the phrase "reasonable business purpose" that the court finds unreasonable and lacking a rational basis in this case.

The HE finds several problems with Sam's Club's desire to maintain a conservative business image as a reasonable business purpose. First, the HE picks apart the reasons Sam's Club offers, which are: 1) requiring conservative dress of its employees having public contact assists in keeping customers focused on Sam's Club's products; and 2) that maintaining a conservative dress code for its employees is in keeping with its desired public image, which not only reflects Sam's Club's own general philosophy, but which it also believes comports with its customers' expectations.

With regard to the first of Sam's Club's reasons, the court finds that the HE misses the point in that he takes it much too literally. The HE assesses the likelihood of one individual customer, shopping at Sam's Club for its quality and prices, being distracted by seeing an eyebrow ring on one of its employees to the point where that customer's decision to purchase goods is adversely affected. Of course, when framed that way, such a possibility does not seem very likely. However, it is obvious to the court that Sam's Club's concern in that instance is not with the individual customer. Rather, it is with its customer base taken as a whole, and its customers' overall perception that Sam's Club is a spartan, "no-frills" business, doing its best to hold prices down while maintaining product quality."[6]

As for Sam's Club's desire to project an image consistent with its own conservative or "traditional" value system, the HE seems to have reacted in a knee-jerk fashion to what he finds personally repugnant. First, he states simply that in his opinion, the desire to project a conservative business image is not a reasonable business purpose under the ordinance. While allowing that "[d]ress codes ... have their place in business[,]" and that "[b]usiness image is an important aspect of some businesses[,]" he arbitrarily decides that Sam's Club's desire to maintain a conservative business image by, among other things, prohibiting its employees from wearing facial jewelry does not constitute a reasonable business purpose.

Next, decrying the dangers of retailers catering to the lowest common denominator of their customers' prejudices, he points to Gerdom v. Continental Airlines, Inc., 692 F. 2d 602 (9th Cir. 1982) as an example. However, Gerdom is readily distinguishable from this case. In Gerdom, Continental discharged a female flight attendant for having surpassed the prescribed weight limit because it believed its customers preferred being served by thin, attractive women. *Id.,* at 604. Gerdom was a sex, or gender discrimination case. *Id.,* at 610. Its weight limit did not apply to male flight attendants.[7] *Id.,* at 604. In the case at bar, Sam's Club's dress code policy prohibiting facial jewelry is uniformly applied to all its employees.

Maier too objects to Sam's Club's desire to maintain a conservative business image as a reasonable business purpose for proscribing facial jewelry on its employees. Like the HE, Maier bases her objection on the notion that it is wrong, and inconsistent with the ordinances, for any business to "cater to the perceived prejudices of [its] customers .... " As did the HE, Maier also analogizes this case to other types of discrimination, such as that involved in Gerdom, and raises the specter of racial discrimination as well.

Next, Maier claims that the MEOC has historically found discrimination where it believed an employer's "reasonable business purpose" for prohibiting certain manners of dress or adornment by its employees was based on the employer's fear that its customers would be offended. Maier cites Maxwell v. Union Cab Cooperative, MEOC Case No. 21028 (12/31/91), in which a male cab driver complained that he suffered discrimination because he wore makeup, earrings and nail polish to work. Although the hearing examiner in that case did not find discrimination on the basis of physical appearance, the MEOC did. Union Cab did not want Maxwell wearing makeup, earrings, and nail polish on the job because it believed Maxwell was alienating the cooperative's business accounts by doing so.

Again, the court finds Maxwell distinguishable from the instant case. Union Cab's directive to Maxwell not to dress or adorn himself as described above while working was very likely intended to protect the cooperative from its business customers' prejudice toward homosexuals. The point being that Union Cab would not likely have made the same request of a female driver as it did of Maxwell. It was likely not Maxwell's physical appearance per se to which Union Cab objected. Rather, it was more likely what the sight of a man adorned as Maxwell was represented to the cooperative's business clients. As noted, in this case, Sam's Club's policy against facial jewelry on its employees applies across the board.

Both the HE and Maier contend that the MEOC's decision in Quinn-Gruber v. WPS, MEOC Case No. 2877 (Recommended Decision 9/27/82) is inapposite as support for Sam's Club's position. The hearing examiner in that case (HEQ) stated as a matter of law that "it is not improper for an employer to proscribe in a uniform manner, for purposes of business image, the wearing of tennis shoes and/or blue jeans in an office setting where there is even minimal public contact." *Id.* at 12-13.

However, the complainant in Quinn-Gruber was fired ostensibly because she wore dresses and skirts with "extreme hemlines," i.e., too long, in violation of WPS's dress code. The HEQ determined that WPS's articulated reason for not allowing such long skirts, which was that they posed a health and safety issue, was not credible. *Id.,* at 14. The HEQ also determined that WPS's prohibition against "extreme hemlines" was too vague for a person of average intelligence to understand what was acceptable and what was not. *Id.,* at 13.

The MEOC vacated the HEQ's decision, stating the complainant had not sufficiently carried her burden to prove that WPS's "health and safety" concerns regarding "extreme hemlines" was a pretext for discrimination on the basis of physical appearance. MEOC Case No. 2877 (Order from Appeal 1/27/83), at 2.[8] The MEOC's decision was silent as to the HEQ's finding that business image is a reasonable business purpose. *Id.* Thus, the HE's (in this case) dismissal of Quinn-Gruber as support for Sam's Club's position is incorrect.

The HE here also distinguishes Quinn-Gruber from this case on the basis that Quinn-Gruber involved an office setting rather than a general retailer's business. However, the HE offers no reason or legal support for such a distinction, and the court therefore finds it arbitrary and unreasonable.

Maier asserts that the Quinn-Gruber decision is too old to constitute sufficient legal authority. She also contends that the MEOC has not followed Quinn-Gruber in any of its decisions since. Maier's argument goes to the issue of what level of deference the court should afford the MEOC's decision here. However, the court has already determined it owes no deference to the MEOC in this case, because the court finds its decision unreasonable. Morris v. Employe Trust Funds Bd., supra, at 186-87.

Maier also claims that Sam's Club's reliance on State ex rel. McDonald's v. MEOC, Dane County Case No. 82CV2500 (7/6/83) is misplaced because that decision is not precedent. However, the court does find it instructive in that Judge Bardwell seemed to take for granted the notion that McDonald's desire to project a "clean public image" was not improper. Additionally, the court finds it interesting that Maier objects to Sam's Club's reliance on McDonald's when the HE in this case cited to the unpublished court of appeals decision in McDonald's as support for his opinion that considerations of health and safety constitute a reasonable business purpose, while a desire to project a conservative business image does not.

Much of the MEOC's and Maier's position evokes a "slippery slope" argument, i.e., that if Sam's Club is allowed to prohibit its employees from wearing facial jewelry on the basis that it believes its customer base expects an overall conservative appearance in its business, what could come next is that a business might decide its customers are offended by the appearance of employees of color, or that its customers only want to see large-

breasted female employees. However, the court sees the slippery slope argument from a different perspective: if it is considered discrimination for a business like Sam's Club to prohibit the wearing of facial jewelry by all of its employees, does that mean Sam's Club would have to allow its employees to come to work wearing whatever they please, as long as they also wear the prescribed company vest?

Finally, although the HE declined to address Sam's Club's argument that for the purposes of its dress code the terms prescribe and proscribe are the same, the court agrees with Sam's Club. Sam's Club's position is consistent with the HEQ's holding in Quinn-Gruber, which the MEOC left in tact on appeal. Quinn-Gruber v. WPS, MEOC Case No. 2877 (Recommended Decision and Order 9/27/82, Order from Appeal, 1/27/83). The HEQ stated

> "Further, I hold that the Ordinance, by inference, permits an employer to proscribe attire so long as the proscription is uniformly applied to employees for a reasonable business purpose. Essentially, for purposes of the physical appearance ordinance section, "prescription" and "proscription" are one in [sic] the same. "

Recommended Decision and Order, at 12.

**CONCLUSION**

Based on all of the above considerations, the court finds that the MEOC's decision in this case is unreasonable exhibiting an exercise of its will and not its judgment. The court therefore REVERSES the MEOC's decision and hereby DISMISSES Maier's complaint.

IT IS SO ORDERED.

Dated this 19th day of July, 2002.

BY THE COURT:

The Honorable Robert A. DeChambeau
Dane County Circuit Court - Branch 1

---

[1]MGO § 3.23(8)(a) reads in relevant part as follows:

> (8) Employment Practices. It shall be an unfair discrimination practice and unlawful and hereby prohibited:
>
> > (a) For any person or employer individually or in concert with others to fail or refuse to hire or to discharge any individual ... because of such individual's sex, race, religion, color, national origin or ancestry, age, handicap, marital status, source of income, arrest record or conviction record, less than honorable discharge, *physical appearance,* sexual orientation, political beliefs or the fact that such person is defined herein ....

(Emphasis added.)

[2]MG0 § 3.23(2)(aa) reads in relevant part as follows:

> (aa) Physical appearance means the outward appearance of any person, irrespective of sex, with regard to hair style, beards, manner of dress, weight, height, facial features, or other aspects of appearance. It shall not relate, however, to the requirement of cleanliness, uniforms, or prescribed attire, if and when such requirement is uniformly applied ... to employees in a business establishment for a *reasonable business purpose.*

(Emphasis added.)

[3]Sam's Club also cited MGO § 3.23(10)(c)(4), which states that all final determinations of the MEOC "shall be subject to review as by law tray be provided." However, that ordinance has no bearing on whether the court has subject matter jurisdiction over the action in this forum.

[4]The court here refers to Dane County Circuit Court cases *Wlliam Karaffa v. Equal Opportunity Commission,* No. 82CV2500 (decided by the Honorable Richard W. Bardwell for Branch 1), and *Union Cab Cooperative v. Equal Opportunities Commission of the City of Madison,* No. 92CV3260 (decided by the Honorable P. Charles Jones for Branch 3). Copies of those decisions were provided to the court by Sam's Club with its briefs.

[5]Tax Department of Community Affairs v. Burdine, 450 U.S. 248, 252-53, 101 S.Ct. 1089 (1981), McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-803, 93 S.Ct. 1817 (1973).

[6]The court believes such a perception would not have to be tied to a conservative life philosophy - it could reflect merely a desire for simplicity.

[7]At the time of the Gerdom case, Continental's male in-flight service workers had the title of Directors of Passenger Service (DPS). The DPS's earned more money for essentially the same work as that of the female flight attendants, although they were also considered supervisors. Gerdom, 692 F.2d at 604.

[8]The MEOC further remanded Quinn-Gruber back to the HEQ "to re-examine the issues of alleged retaliation for opposition to discriminatory practices." Order from Appeal, at 2.

**EQUAL OPPORTUNITIES COMMISSION**
**CITY OF MADISON**
**210 MARTIN LUTHER KING, JR. BOULEVARD**
**MADISON, WISCONSIN**

| | |
|---|---|
| Tonya Maier<br>6784 Buethin Rd<br>Dane WI 53529<br><br>Complainant<br><br>vs.<br><br>Sam's Club<br>7050 Watts Rd<br>Madison WI 53719<br><br>Respondent | COMMISSION'S DECISION AND FINAL ORDER<br><br>Case No. 19992203 |

BACKGROUND

On November 11, 1999, the Complainant, Tonya Maier, filed a complaint of discrimination with the Madison Equal Opportunities Commission (Commission). The complaint charged that the Respondent, Sam's Club discriminated against the Complainant on the basis of her physical appearance (wearing an eye brow ring) when it terminated her employment. The Respondent contended that its policy prohibiting facial jewelry was supported by a reasonable business purpose.

After investigation of the complaint, a Commission Investigator/Conciliator issued an Initial Determination concluding that there was probable cause to believe that the Respondent had discriminated against the Complainant on the basis of her physical appearance when it terminated the Complainant's employment. Efforts at conciliating the complaint were unsuccessful. The complaint was transferred to the Hearing Examiner for a public hearing on the merits of the complaint.

Prior to public hearing, the parties agreed between themselves that hearing of the complaint's allegations should be bifurcated along the lines of liability and damages. The Hearing Examiner acquiesced to the parties' wishes.

On August 24, 2000, a public hearing was held on the allegations of the complaint. Subsequent to the submission of written briefs, the Hearing Examiner issued his Recommended Findings of Fact, Conclusions of Law and Order along with a Memorandum Decision on March 30, 2001. The Hearing Examiner concluded that the Respondent had discriminated against the Complainant on the basis of physical appearance and recommended further proceedings to set an appropriate remedy.

The Respondent timely appealed the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order to the Commission. After the opportunity to submit written arguments in support of the parties position, the Commission met on September 20, 2001 to address the Respondent's appeal. Commissioners Boyd, Hicks, Marunich, Morrison, Rudd, Tomlinson, Van Rooy, Verriden and Zipperer participated in the Commission's deliberations.

## DECISION

The Respondent requested the opportunity to present oral arguments. The request was made in its appeal brief and did not contain the required demonstration of necessity. The Commission did not address the Respondent's request since it was not substantially in the form set forth in the Rules of the Equal Opportunities Commission. Rule 13.3.

After review of the record in this matter, the Commission finds that the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order dated March 30, 2001 is fully supported by the record in this matter. The Hearing Examiner's Recommended Findings of Facts, Conclusions of Law and Order correctly finds the facts and reasonably applies those facts to the law. The Hearing Examiner's interpretation of the law is reasonable and is supported in the Memorandum Decision. The Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order represent his judgment, not an exercise of his will. The Commission adopts and incorporates by reference as if fully set forth herein, the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order dated March 30, 2001.

## ORDER

The Respondent's appeal is dismissed. This matter is remanded to the Hearing Examiner for further proceedings consistent with this decision.

Joining in the Commission's action are Commissioners Boyd, Hicks, Marunich, Morrison, Rudd, Tomlinson, Van Rooy, Verriden and Zipperer. No commissioners opposed the Commission's action and no Commissioners recused themselves.

Signed and dated this 1st day of October, 2001.

EQUAL OPPORTUNITIES COMMISSION

Bert G. Zipperer
EOC President

BGZ:17

**EQUAL OPPORTUNITIES COMMISSION**
**CITY OF MADISON**
**210 MARTIN LUTHER KING, JR. BOULEVARD**
**MADISON, WISCONSIN**

| | |
|---|---|
| Tonya Maier<br>6784 Buethin Rd<br>Dane WI 53529<br><br>Complainant<br><br>vs.<br><br>Sam's Club<br>7050 Watts Rd<br>Madison WI 53719<br><br>Respondent | DECISION AND ORDER<br><br>Case No. 19992203 |

RECOMMENDED FINDINGS OF FACT

1. The Complainant, Tonya Maier worked for the Respondent as a cashier.
2. The Respondent, Sam's Club, Inc., a division of Wal-Mart, Inc., is a retailer doing business at 7050 Watts Road, in the City of Madison, Wisconsin.
3. The Complainant customarily had facial jewelry in the form of an eyebrow piercing.
4. All of Complainant's cashier duties involved contact with consumers.
5. The Respondent has a written dress code that states, "Appearance must be conservative, neat and clean" and "Nose rings or other facial jewelry are not allowed."
6. Respondent terminated Complainant for wearing facial jewelry, a violation of its dress code.

CONCLUSIONS OF LAW

7. The Respondent is an employer within the meaning of Madison General Ordinance §3.23.
8. The Complainant is a member of the protected class "physical appearance."
9. Preservation of a conservative business image does not constitute a "reasonable business purpose" under §3.23(1)(aa).
10. The Respondent discriminated against the Complainant in violation of §3.23 by terminating the complainant's employment for wearing facial jewelry.

ORDER

The Respondent is hereby ordered to cease and desist from discriminating on the basis of physical appearance.

The Respondent is ordered not to retaliate against Complainant for her exercise of her rights.

This matter shall be set for further proceedings to establish damages.

MEMORANDUM DECISION

This complaint presents a matter of statutory analysis. In particular, this case requires an interpretation of where facial jewelry falls within the definition of physical appearance and what may qualify as a reasonable business purpose. A hearing was held on August 24, 2000. The hearing was conducted solely on the issue of liability. The parties bifurcated that a hearing for damages would be necessary only upon a finding of discrimination. The Hearing Examiner finds that Respondent discriminated against the Complainant when it terminated her for wearing facial jewelry. The Complainant falls under the "physical appearance" definition as stated in Madison General Ordinance §3.23(2)(aa). The business purpose articulated by the Respondent is not a reasonable one for the purposes of the ordinance.

The Respondent hired Complainant for a cashier position. Dave Hill, a General Manager with the Respondent, informed the Complainant that she could wear a pierced eyebrow ring at work if the jewelry was transparent or covered with a bandage. Complainant complied with this directive by wearing a bandage. Sometime before October 31, Mr. Hill reconsidered his decision to allow Complainant to wear facial jewelry because one of two other Respondent employees had been taking advantage of Hill's lenience in enforcing the no facial jewelry policy. On October 31, Mr. Hill informed the Complainant that facial piercing was no longer acceptable and that the Complainant would be sent home if she wore her facial piercing. On November 1, 1999, the Complainant wore her eyebrow ring to work and discussed it with Mr. Hill.

The Respondent has a dress code that specifically prohibits "(n)ose rings or other facial jewelry". On November 3, 1999, Complainant removed her eyebrow ring before work but reinserted it when the piercing began to close. The Complainant informed Mr. Hill of this difficulty and Mr. Hill sent the Complainant home for a dress code violation. On November 4, 1999, the Complainant wore her eyebrow ring to work. The Respondent fired the Complainant for violations of the dress code.

The Commission has often utilized the Burdine-McDonnell Douglas burden shifting approach in employment discrimination cases. Ashford v. Magna Publishing, MEOC Case No. 22719 (Ex. Dec. 3/27/00). Despite the broad use of the strict burden shifting approach offered in McDonnell Douglas, the Supreme Court has recognized that it does not need to be slavishly applied in all cases. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 31 FEP 609 (1983). As in the Aikens case, the parties here have spent much time and effort addressing the ultimate question of discrimination. The Hearing Examiner may move directly to the question of discrimination without delving too deeply into the niceties of the McDonnell Douglas analysis. Hayes v. Clean Power, MEOC Case No. 19982028 (Ex. Dec. 10/7/99).

In establishing her prima facie case, the Complainant contends that she is a member of the protected class "physical appearance" on the basis of her decision to wear facial jewelry. The Respondent argues that facial jewelry does not fall within the meaning of "physical appearance." The definition as specified by the ordinance reads:

> Physical appearance means the outward appearance of any person irrespective of sex, with regard to hairstyle, beards, manner of dress, weight, height, facial features, or other aspects of appearance. It shall not relate, however, to the requirement of cleanliness, uniforms, or prescribed attire, if and when such requirement is uniformly applied for

admittance to a public accommodation or to employees in a business establishment for a reasonable business purpose. (Madison General Ordinances §3.23(2)(aa)).

The Respondent uses etymological gymnastics to show that facial jewelry does not fit within the definition of physical appearance. Respondent argues that the definitions of adorn, array, attire and jewelry all point toward the ornamental nature of attire, with ornamentation being apart from clothing, and therefore outside the "manner of dress" term in the ordinance.

The Hearing Examiner accepts that facial jewelry falls within the "other aspects of appearance" portion of the physical appearance definition. Appearance is defined as "outward aspect."[1] Taken at its plainest meaning, the word refers to characteristics or items that people can see. Jewelry certainly fits within this broad definition. The Madison Common Council did not likely include the catch-all language of "or other aspects of appearance" in order to restrict or limit aspects of appearance to only those specifically named. By excluding certain types of attire, as prescribed by a dress code for example, the ordinance recognizes that other types of attire (which can include facial jewelry) are intended to be included.

The parties disagree as to whether the Respondent's proscriptive dress code can be treated the same way as a prescriptive provision in regard to the ordinance. The Hearing Examiner declines addressing that issue as a discussion is ultimately unnecessary in this case. The language regarding prescribed attire in §3.23(2)(aa) hinges on whether Respondent can prove a legitimate, nondiscriminatory reasonable business purpose for the no-facial jewelry policy.

Respondent maintains promoting their conservative image constitutes a reasonable business purpose. Respondent brought expert testimony explaining what constitutes a conservative business image and how facial jewelry is in conflict with that image. In the Hearing Examiner's opinion, the articulated business purpose of a conservative image does not form a reasonable business purpose for the purposes of the ordinance.

The conservative image argument as framed by the Respondent points toward two ideas. The first is that a conservative image embodied in workers and the facility leads to a focus on the products sold by Respondent. The Hearing Examiner finds difficulty in accepting this idea. Respondent stresses numerous times that as a cashier, Complainant was in contact with consumers. If consumers are traveling to the Respondent's store and selecting goods for their quality or price and then walking to the cashier to purchase them, it is unlikely that the appearance of a eyebrow piercing would then distract and dissuade them from purchasing the items. Consumers who decide to purchase products at a particular store may do so with concerns for price and quality. However, a consumer who conditions patronage based prejudices and bias towards certain physical appearances is one thing. A general retailer who caters to that lowest common denominator and infringes on employees' rights is another.

[1]Webster's New Collegiate Dictionary, 54

The second idea is that an eyebrow piercing, disrupts the product focus, conflicts with consumer expectations, and is at odds with a system of values purported to be held by Respondent and its consumers. Conditioning employment based on characteristics of physical appearance in accordance with what an employer believes consumers will find more pleasing will not be met kindly. Gerdom v. Continental Airlines, Inc., 692 F.2d 602 (9th Cir. 1982). In Gerdom, a female flight attendant was discharged for surpassing the weight limit prescribed by Continental. Continental's sole proffered business purpose was justified based on perceived consumer preferences for thin, attractive females. Id. At 604. According to Gerdom, "passengers' preference for attendants who conform to a traditional image" should not enter into employment policies.

In similar fashion, Respondent asserts that it is shaping its employees' appearance to project a conservative image that will cater to values shared by consumers and Respondent. For a general-public retailer to justify a business purpose based on perceived consumer prejudices or values is to defy the nature of the ordinance. The ordinance is designed to protect employees from prejudice based on qualities unrelated to job performance while simultaneously allowing employers to maintain appropriate standards in areas like safety and health. The ordinance's range is much narrower than it appears.

Reasonable business purposes may be tied to considerations of health or safety. State ex rel. McDonald's v. Madison Equal Opportunity Comm., 120 Wis. 2d 677, 356 N.W.2d 495 (Ct. App. 1984) (unpublished). The business purpose of conservative image cannot be considered as promoting health or safety concerns. The business purpose of conservative image does not rise to the level of concern or immediacy that health or safety concerns require.

Ideas of characterizing physical appearance differ in various settings and locales. It is common sense that appearances that are acceptable for one business may be unsuitable or unnecessary for another. What passes as necessary attire for a corporate law firm is different from attire for a welder or a general retailer. Appearances may also differ by region or location. Cowboy boots may be conservative in Dallas or Little Rock but trendy in Miami or New York. Neither the Respondent, nor anyone else is able to say with certainty what traits or appearances unquestionably constitute a conservative image.

Respondent argues that in line with Quinn-Gruber v. Wisconsin Physicians Service, MEOC Case No. 2877, as a matter of law, business image is a reasonable business purpose because Complainant worked in public contact. This fails for two reasons. First, the Quinn-Gruber finding of discrimination was vacated by the Commission. Second, even if the decision remained intact, the scope of the decision was limited to office settings, a setting different in nature from that of a general retailer.

Complainant did not offer witnesses to attempt to disprove Respondent's articulated reasonable business purpose. But because Respondent's articulated purpose falls short of what the ordinance demands, Complainant's failure to disprove the articulated purpose does not defeat her claim.

The characteristic in question here is not an immutable physical trait. Respondent argues that facial jewelry's changeable nature places it outside the reach of the ordinance. The ordinance is intended to address transient characteristics such as political beliefs or dyed hair as well as personally chosen characteristics of appearance like hairstyle, hair length, or jewelry.

Dress codes, both written and unwritten, have their place in business. Business image is an important aspect of some businesses. But for the purposes of this ordinance, restricting physical appearance for the Respondent's reasons cannot be accepted.

Signed and dated this 30th day of March, 2001.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

CEB:17