J. INDIVIDUAL EMPLOYMENT RIGHTS, Vol. 4(1) 67-79, 1995-96

A "HAIRY" QUESTION: DISCRIMINATION AGAINST EMPLOYEES WHO VIOLATE EMPLOYERS' APPEARANCE POLICIES

SHARLENE A. MCEVOY
Fairfield University, Connecticut

ABSTRACT

Many employers have rules on how much hair their employees may wear. In two 1993 cases, the federal courts decided the issue of wearing beards in different ways. This article analyzes several other inconsistent federal court decisions decided in the past quarter century in which some appearance policies were found violative of employee rights while others were found to have a rational basis in safety considerations.

During the past quarter century, there have been numerous cases in which employers have been sued by their employees who have chosen to wear beards or hair styles that contravene grooming policy. More recently, in 1993, two circuit courts of appeals revisited this issue and made different decisions.

This article analyzes the decision in *Bradley v. Pizzaco of Nebraska* [1] and *Fitzpatrick v. City of Atlanta* [2], as well as previously decided cases involving public and private employers who seek to impose a grooming policy. It is the thesis of this article that the law will allow an employer to impose a grooming policy only if the employer can show the policy has a rational relationship to safety and has only an incidental discriminatory impact.

PRIVATE EMPLOYERS

In October 1993, in a decision that received little notice, a federal appeals court in St. Louis ruled that Domino's Pizza must waive its ban on beards for black employees who suffer from a skin ailment known as pseudofolliculitis (PFB) [3].

© 1995, Baywood Publishing Co., Inc.

doi: 10.2190/NTAB-JG2F-Q4A9-456X
http://baywood.com

Pseudofolliculitis is a facial skin condition that afflicts persons, mostly black males, with curly or kinky hair follicles. Abscesses can develop and cause scarring and hyperpigmentation and disfigurement. Once one is affected by PFB, it lasts forever because there is no cure. There can be a remission if the person grows a beard at least one-quarter inch long [4]. If a person resumes shaving, the condition recurs. Medical experts say PFB afflicts half of black men who shave, and half of those with PFB should not shave at all [3].

The case began in 1983 when Langston J. Bradley of Omaha, Nebraska, an African-American, got a part-time job as a delivery driver for Domino's Pizza. Coincidentally, he worked as investigator for the Nebraska Equal Employment Opportunity Commission (EEOC).

After working for Domino's for only a few weeks, he was told he would have to shave the beard he had begun to grow or lose his job. Since Bradley had gotten a shaving waiver while in the military, he believed Domino's policy was discriminatory because it limited the opportunity of African-American men to work for Domino's. He filed suit on the grounds that the company's rule discriminated against African-American men, thus violating the federal Civil Rights Act [3].

The EEOC intervened on Bradley's behalf and other African-Americans in this disparate impact case but did not dispute that Domino's is otherwise free to enforce its no-beard policy [5].

Domino's argued, citing its own surveys, that many customers would have a negative reaction to bearded deliverymen, and a federal district court judge agreed that Domino's had a legitimate business reason for its policy. Moreover, the court found Bradley's PFB condition was not so severe that he needed to avoid shaving.

In October 1993, a three-judge panel for the Eighth Circuit Court of Appeals in St. Louis ruled unanimously that Domino's must adapt its no-beard rule to accommodate PFB sufferers [3, 6]. The court declared:

> Domino's is free to establish any grooming and dress standard it wishes. We hold only that reasonable accommodation must be made for members of a protected class who suffer from PFB. We note that the burden of narrow medical exception for African-American males who cannot shave because of PFB appears minimal [3].

The court did not accept Domino's "business necessity" defense because it said "the existence of a beard on the face of a deliveryman does not affect in any manner Domino's ability to make or deliver pizzas to customers" [3, 7].

The EEOC established a prima facie case that Domino's no-beard policy had a disparate impact on African-American males through expert medical testimony. The EEOC demonstrated the employer's policy excluded African-American males who suffered from PFB at a substantially higher rate than white males [8].

The case thus boiled down to a facially neutral employment policy that was discriminatory when applied to African-American males.

Title VII forbids employment policies with a disparate impact unless the policy is justified by legitimate employment goals.

Through expert medical testimony, EEOC showed that blacks have more difficulty shaving than white males, so in effect Domino's facially neutral grooming policy "operates as a built-in headwind for black males" [5, at 610, 612]. PFB prevents a large segment of black males from being clean-shaven but does not similarly affect white males.

The Bradley case is similar to a case decided by the U.S. District Court in 1984, *Richardson v. Quik Trip Corp.* [9]. Like *Bradley* [1], Richardson sued under Title VII of the Civil Rights Act, claiming he was discharged for violating Quik Trip's no-beard policy. He argued the company's grooming requirements constituted racial discrimination because it had a disparate impact on African-American males.

Quik Trip claimed Richardson accepted employment with the firm knowing of its no-beard policy and knowing he was medically unable to comply with the policy. After leading the company to believe that he would comply, he waived any right to object to the no-beard policy and cannot bring an action [9, at 1153].

Quik Trip further claimed its opinion surveys supported its policy. But the court found the company's survey not to be reliable since it was not validated by sampling techniques and thus not admissible to show how the average convenience store customer reacts to personnel who wear beards [9, at 1153].

Management had developed an official procedure manual that contained various company policies, including an appearance standard that said:

> Grooming: All employees are to be clean and well-groomed. Employees may not wear beards or goatees. Employees may wear mustaches provided they are neatly trimmed and clean. Handlebar, Fu Manchu, and other mustaches extending below the corner of mouth are not acceptable [9, at 1154].

By this policy, Quik Trip sought to maintain its position in a competitive market "by projecting a consistent, positive image of a food store which also sells gasoline and offers fast, friendly service by clean, competent employees, in pleasant surroundings" [9, at 1154].

Like Domino's, Quik Trip feared its carefully nurtured image would be marred if it allowed exceptions to its no-beard policy for employees such as Richardson and customers would take their business elsewhere. In addition, Quik Trip contended enforcement of its no-beard policy was necessary to insure its employees continued to comply with health regulations in the various states in which it has stores. Yet the only evidence presented to support this argument was a Tulsa, Oklahoma ordinance that required a person working in a food establishment to wear a hairnet while engaged in food processing or serving [9, at 1154]. Contrary evidence was presented indicating Quik Trip employees only bag ice or clean self-service food equipment, so they cannot be considered food servers.

Richardson, like Bradley, relied on a disparate impact theory to show he was a victim of discrimination. Under that theory Richardson did not have to prove Quik Trip acted with discriminatory intent to make out a prima facie case. Richardson only had to show that the no-beard policy actually operates to exclude a disproportionate number of African-Americans from employment with Quik Trip [9, at 1154].

Once Richardson established the prima facie case, the burden shifted to Quik Trip to show its no-beard policy was justified by business necessity, which it did not prove.

The court concluded that Richardson proved that Quik Trip's no-beard policy operated to exclude a disproportionate number of African-American males from employment with the company [9, at 1155]. Scientific studies showed that between 45 to 83 percent of all black males who could shave may be excluded from employment with Quik Trip, while fewer than one percent of white males would be affected. Moreover, Quik Trip failed to show its no-beard policy was justified by business necessity. The court concluded Quik Trip can enforce its no-beard policy against all employees except those who provide a medical certificate showing they are afflicted by PFB [9, at 1155].

In *Rafford v. Randle Eastern Ambulance Service, Inc.* [10], disgruntled employees tried a different tack. They claimed the employer discriminated against them on the basis of sex. However, the district court held that the plaintiffs' firing based on their refusal to remove their beards and mustaches, was not sex-based discrimination prohibited by Title VII.

The ambulance company had always maintained a policy against the growth of beards and mustaches. Its operating manual specified:

> While on duty employees will present a neat, clean appearance paying particular attention to the following:
> a. Clean shaven
> b. Hair properly trimmed and combed.

Randle had no policy concerning hair length, and the plaintiffs were not dismissed until they reported for work unshaven and refused to shave off their beards and mustaches [10, at 317].

While the plaintiffs alleged their refusal to cut their hair had contributed to their dismissal and females with equally long hair were allowed to work, the court found the length of their hair and their refusal to cut it was not the reason they had been fired [10, at 317].

The court was also unsympathetic to the plaintiffs' claim that their firing was due to their failure to shave off their facial growth—a special male characteristic that discriminates against them because of their sex. In effect, they argued that males who do not shave cannot work, while females who do not and need not shave are allowed to work. The court noted this was a case of discrimination in

favor of men who shave off their beards and mustaches, not sex discrimination [10, 11].

Facial hair also was the issue in *Berman v. Trans World Airlines, Inc.* [10, at 319-320], where the plaintiffs sought to enjoin the enforcement of a provision contained in a collective bargaining agreement between Trans World Airlines (TWA) and the Airlines Pilots Association (ALPA), which prohibited pilots from wearing beards.

Prior to the execution of the contract TWA had in effect regulations governing the appearance of flight officers that prohibited the wearing of beards of any description. After a grievance was filed, a board of adjustment ruled that TWA had introduced insufficient evidence to show the rule was necessitated by safety factors and customer acceptance. The airline was barred from enforcing its no-beard rule but could require that the facial hair worn by its flight officers be "neatly trimmed and maintained" [13].

During subsequent negotiations between the airline and ALPA toward extending a collective bargaining agreement, TWA proposed a no-beard clause, but allowed neatly trimmed and maintained sideburns or mustaches. Parties differ as to the safety of the no-beard requirement, but members of the ALPA negotiating committee believed the company wanted TWA pilots to be clean shaven for image purposes [13, at 1305].

A number of airlines have regulations governing the appearance of flight crews that prohibit beards [13, at 1307], and the court found ALPA's decision to agree to the no-beards proposal reflected "a proper resolution of conflicting but legitimate interests" [14]. Thus, the policy did not violate any statutory or constitutional prohibition against discrimination [13, at 1314].

PUBLIC EMPLOYERS

The most recent case in which facial hair has come up in public sector employment is *Fitzpatrick v. City of Atlanta*. The facts were similar to *Bradley* [1], in that twelve African-American fire-fighters suffered from PFB, which precluded their shaving. They brought suit challenging fire department regulations requiring all firefighters to be clean shaven. They alleged the city's no-beard rule had a discriminatory, disparate impact on African-Americans, was adopted for racially discriminatory reasons in violation of Title VII of the Civil Rights Act of 1964, and also discriminated against the handicapped in violation of section 504 of Rehabilitation Act of 1973 [2].

The City of Atlanta defended the policy contending the respiratory units used by the firefighters could not safely be worn by bearded men. To breathe in a smoke-filled environment, firefighters must wear the devices, otherwise known as positive pressure self-contained breathing apparatuses (SCBA) [2, at 1113]. For the SCBA mask to operate properly and safely, its edge must be able to seal securely

to the wearer's face. The parties did not dispute that wearing long facial hair could interfere with forming a proper seal.

The city had modified its policy to accommodate fire-fighters with PFB. They were permitted to participate in shaving clinics. Shaving-clinic participants were allowed to wear very short shadow beards that were not to exceed length limits specified by the city dermatologist. But in 1988, the fire department decided shadow beards would no longer be permitted because they might interfere with safe use of SCBAs [2, at 1114].

Under the new policy, firefighters who could be clean shaven had to be removed from firefighting duties and transferred to other positions within the department if suitable openings were available. While they could apply for other available positions with the city, they were given no special priority and had to compete on an equal basis with other candidates [2, at 1113].

Under the new policy, such affected persons were granted the right to be temporarily reassigned from firefighting duties for ten days. Male firefighters who could shave and for whom nonfire-fighting positions were not available with departments would be terminated once they exhausted their ninety-day temporary assignment [2, at 1114].

The appeals court said Title VII of Civil Rights Act of 1964 prohibits employers from taking action or engaging in practices that discriminate against workers or job applicants on basis of race, color, religion, sex, or national origin [2, at 1114].

The ban on employment discrimination extends not just to actions taken or practices instituted for discriminatory reasons but also to discriminatory actions or practices that have a discriminatory effect [15].

Thus, to establish Title VII liability under an effect-based definition of discrimination, the firefighters had to demonstrate that the challenged employment practice—the no-beard policy—had a disproportionately adverse impact on them. Having made out a prima facie case, the city had to show its policy was necessary to meet a goal that qualifies under Title VII [2, at 1112, 1117; 16].

The city attacked on two fronts. First, it argued the firefighters had failed to address statistics required under Title VII to show that PFB afflicts African-Americans disproportionately and so had failed to prove the no-beard rule excluded African-American men from firefighting jobs [2, at 1118].

Second, the city offered an affirmative business necessity defense, claiming the ban on shadow beards was necessary to meet the goal of ensuring worker safety. The city supported its argument with an affidavit from an expert in the field of occupational safety and health, citing United States Occupational Safety and Health (OSHA) regulations concerning the use of respirators by persons with facial hair. The expert stated, in his opinion, the SCBA should not be worn with *any* amount of facial hair because it interferes with the forming of a proper seal between SCBA and the wearer's face [2, at 1119]. An imperfect seal may permit air from the outside environment to leak into the mask and, when this occurs, the

wearer is said to have overbreathed, thus risking exposure to contaminants [2, at 1120, 17].

The firefighters refuted the city's claim by showing that from 1982-1988, the city permitted firefighters to wear SCBAs over shadow beards. Firefighters thus argued the shadow-beard program was tested without mishap or problems in obtaining an adequate seal. There is a genuine question as to whether or not shadow beards are safe. The court pointed out that the plaintiffs did not collect evidence showing how carefully the seal was monitored during the period. The court said, "The mere absence of unfortunate incidents is not sufficient to establish safety of shadow beards, otherwise safety measures could be instituted only after one accident had occurred rather than to avert accidents" [2, at 1120]. Moreover, the firefighters did not come forward with evidence to show that shadow beards do not prevent SCBA from sealing to face and are therefore a safe alternative.

> The appeals court thus believed the evidence affirmatively demonstrates not only that being clean shaven is a business necessity for fire fighters but also that any proposed less discriminately alternative is a "no-beard" rule, that would not require fire fighters to be clean shaven would not be adequately safe [2, at 1121].

The court also found that while work constitutes a "major life activity," it expressed some doubt that PFB qualifies as a physical impairment or whether a PFB sufferer precluded from shaving is substantially limited in a major life activity such as "working" [2, at 1126].

The court found the firefighters failed to show the availability of a reasonable accommodation through which they might safely perform the essential function of their jobs without having to be clean shaven.

The court rejected the firefighters' suggestions that either the "shadow beard policy be re-instituted or that partial shaving be permitted as inadequate mans of obtaining the proper seal" [2, at 1127].

By contrast, a court reached an opposite conclusion in *Johnson v. Memphis Police Dept.* [18], when an African-American police officer brought a civil rights action alleging wrongful termination based on racial discrimination. Lee Johnson was employed by Memphis, Tennessee, as a commissioned police officer, until he informed his commander that he had been diagnosed with uncontrollable folliculitis PFB and requested permission to grow a beard. By regulation, the Memphis Police Department had required all uniformed policy officers to be clean shaven with the exception of a neatly groomed mustache. Some police department employees in nonuniformed positions were allowed to grow beards for non-medical reasons [18, at 245].

Because of his PFB, Johnson was transferred to nonuniformed officer positions. He was advised he was eligible to compete for advancement to the rank of

lieutenant but his name had been withdrawn as a candidate due to his inability to shave.

After agreeing to take steps necessary to conform to police department appearance standards, Johnson was allowed to compete for promotion but was not selected and remained in the Crime Stopper's Bureau.

Johnson was notified that due to a department reorganization, he and other officers would have to transfer to a uniformed position. But Johnson was advised he could not bid for a position in the uniformed division because of the no-beard policy [18, at 246]. Johnson did not bid for a job, and his superiors complained he did not update them on his medical condition. Johnson was suspended but later reinstated in a nonuniformed position.

Johnson argued he was the victim of disparate impact discrimination, but the police department argued that the theory did not apply because the no-beard policy was facially neutral and did not operate to exclude a disproportionate number of minorities [18, at 246]. Further, the department said Johnson was the only police officer who claimed harm from the no-beard policy for commissioned officers.

The district court stated that the manner in which Johnson was manipulated into an unfair choice of staying with the department caused it to find he was intentionally discriminated against when he was terminated because he refused to shave even though he was a victim of a medical condition common to black males. The court decided an employer could maintain a no-beard policy if it accommodated a victim of folliculitis upon being furnished a medical certificate [19, at 247].

There have been other cases in which non-PFB sufferers have brought suit contesting a public employer's no-beard policy. In *Hottinger v. Pope County, Arkansas* [19], emergency medical technicians (EMTs) were terminated by the county ambulance department for refusing to remove facial hair as required by department policy. The EMTs sued, arguing that the regulation violated their substantive due process rights. The court of appeals held that the grooming policy prohibiting mustaches and beards as well as hair of a certain length on male EMTs was not so irrational as to violate their rights.

The plaintiffs worked as part-time EMTs at the Pope County Ambulance Department when the latter issued an official grooming policy that prohibited the wearing of mustaches, beards, and hair of a certain length. Since each of the plaintiffs had facial hair as of the effective date of the grooming policy, they were fired.

The plaintiffs sued under the Civil Rights Act, claiming that being fired for failure to comply with the policy infringed on their liberty interests to control their personal appearance in violation of their substantive due process rights [19, at 128].

The district court concluded the grooming policy had a rational relationship to legitimate governmental goals. The court said that EMTs are uniformed public employees who need to be easily recognized. Since no one would argue that

requiring the EMTs to wear a uniform of a particular style is violative of their substantive due process rights, the ambulance service had the power to treat hair or lack of it as a part of the EMTs' uniform. The policy may be mistaken or silly, but not in violation of the Fourteenth Amendment [19, at 129; 20]. Similarly, in *Kamerling v. O'Hagan* [21], when city firefighters brought suit seeking to overturn a fire department regulation that banned beards and set standards for the length of firefighters' hair, mustaches, and sideburns, the appellate court held the regulation was reasonably related to the interest of the city in the health and safety of its firefighters as well as citizens served.

The commissioner issued a regulation that banned beards and set appearance standards. The plaintiffs were in violation of the regulations and challenged them as an unconstitutional invasion of their right of free expression, due process, and equal protection [21, at 444].

As in the *Fitzpatrick* case [2], the commissioner took the position that the regulations were necessary to insure the safety and security of firefighters.

There was sufficient evidence in the view of the court to justify the regulation, which applied only to department personnel actively engaged in firefighting. Although plaintiffs testified they had never been hampered or endangered by beards (or long hair) the commissioner of fire departments testified that firefighters have had their hair burned below the rim of the helmet and, more importantly, his testimony and scientific data established that beard growth substantially increased the inward leakage rate of face masks. He testified "that a cleanly shaved face is required to achieve a good seal on the face mask of the Scott Airpack respirator used by the New York City Fire Department" [21, at 445].

In *Muscare v. Quinn* [22], a suspended firefighter filed suit claiming his constitutional right to determine his personal appearance had been violated. Muscare's goatee came to his supervisor's attention when he and his company attended a class at the Chicago Fire Academy to train in the use of the self-contained breathing apparatus. The instructor said facial hair should not be worn with the device since the hair would prevent a proper seal. Muscare claimed firefighters in other large cities wore beards and long hair and Muscare himself had successfully tested the mask portion of the apparatus during training and had never experienced any difficulty in obtaining a satisfactory mask seal [22, at 1214].

The court declined to resolve the controversy because it found Muscare had been denied procedural due process.

Michini v. Russo [23] involved Philadelphia firefighters who were fired for noncompliance with Directive 13, a regulation that prescribed the length and neatness of hair. They sued, seeking an injunction against the enforcement of Directive 13, arguing the regulation was unconstitutional on its face and as applied [23, at 841; 24]. Expert testimony as well as much of lay testimony focused on the potential safety hazards presented by the wearing of facial hair or long hair by firemen, with emphasis on the effect of facial hair and long hair on the safe use of

the Scott Air Pak, a self-contained breathing apparatus. The defendant commissioner also believed the grooming directives served a useful purpose in fostering paramilitary discipline as well as public confidence in the department.

In this testimony, plaintiff Michini testified his hair expressed his own image of himself and his appearance projected and expressed his political and social outlook [23, at 842]. While the court found his First Amendment argument to be an interesting one, it held that he and other plaintiffs failed to prove their wearing of long hair had sufficient communicative content to bring it within the ambit of symbolic speech, which is entitled to constitutional protection [23, at 842-3].

The court found evidence presented by the defendant's expert about sealing problems related to the Scott Air Pak more convincing, finding the wearing of beards, sideburns, or long hair in the area of the facepiece seal presented a safety hazard to firefighters. Then, the court concluded Directive 13, in whole and in part, is justified by safety considerations that outweigh the plaintiffs' right to wear beards and long hair [23, at 852].

Dwen v. Barry [25] involved a civil rights action by a police officer acting individually and as president of County Patrolman's Benevolent Association seeking to invalidate the grooming regulations set by the county police department, which barred beards and goatees, among other things. He claimed violation of the First and Fourteenth Amendments.

The appellate court saw the issue as "whether a government may interfere with the physical integrity of the individual by requiring compliance with standards of personal appearance without demonstrating some legitimate state interest reasonably requiring such restrictions on the individual." In this case, the court noted that the only evidence offered by the defendant was an affidavit submitted by the deputy commissioner that was directed at both uniformed and non-uniformed officers, but was silent on the need for the policy in maintaining discipline [25, at 1131].

The court held that "the choice of personal appearance is an ingredient of an individual personal liberty and any restriction on that right must be justified by a legitimate state interest reasonably related to the regulation" [25, at 1130].

CONCLUSION

From a discussion of cases in this article, it is clear the legality of employers' appearance policies is still very much an issue for both public and private employees. Some conclusions may be drawn from these cases. Private employers who ban beards worn by PFB sufferers had better have a medical exception clause in their grooming policies or face an adverse court decision (*Richardson* and *Dominos*). For public employers, PFB sufferers who are forced to wear beards may be barred from jobs when wearing SCBA-equipment would compromise the employee's safety and that of the public (*Fitzpatrick* [2]). If the use of safety

equipment is not an issue, employers will not be allowed to construct artificial barriers in treatment of PFB-sufferers (*Johnson* [18]). In all other cases, employers can promulgate an appearance policy.

In a 1990 study, the *New York Times* found that of forty state and municipal police departments in the United States polled, all but three generally prohibited employees from growing beards. Twelve departments did not allow any medical exceptions. Nine others said that, although they would allow medical exceptions, bearded officers were reassigned from street to desk duty [26].

It is clear there exists a potential for many lawsuits against public and private employers in this area. Wise employers will reexamine their policies to insure they do not discriminate against PFB sufferers so that "hairy" and costly lawsuits can be avoided.

* * *

Dr. Sharlene A. McEvoy is an Associate Professor of Business Law at Fairfield University, Fairfield, Connecticut. She holds a B.A. from Albertus Magnus College, an M.A. from Trinity College, a J.D. from the University of Connecticut, and a Ph.D. from the University of California at Los Angeles. She is also a practicing attorney.

ENDNOTES

1. 939 F. 2d 610 (8th Cir. 1991) 926 F. 2d 714 (suspended).
2. 2 F. 3d 1112 (11th Cir. 1993).
3. Tamar Levin, "Ban on Beards by Domino's Pizza Is Unfair to Blacks, Court Rules," *New York Times*, Nov. 3, 1993 at A-20.
4. *Richardson v. Quik Trip Corp.* 591 F. Supp. 1151, 1154 (1984).
5. 939 F. 2d 610, 611.
6. The decision was written by Judge Pasco M. Bowman 2d, joined by Judges Roger L. Wollman and Frank J. Magill.
7. In a previous round of litigation, the appellate court agreed with the district court judge that Bradley did not have a severe PFB condition. Bradley was dropped from the case. *Bradley v. Pizzaco* had a checkered existence in federal courts, moving from district court to the appellate court then back to district court. After the United States Supreme Court declined to hear a motion on it, it went back to the appellate court.
8. *Civil Rights Act of 1964.* 701 (a) 42 U.S. C.A. 2000 e - 2(a).
9. 591 F. Supp. 1151 (1984).
10. 348 F. Supp. 316 (1972).
11. In *Fagan v. National Cash Register* [12], an employee brought an action alleging he was a victim of unlawful sex discrimination because his employer had a policy that technical service employees, whose duties included visiting offices of the employer's customers for servicing and repairing the employer's equipment, keep hair neatly trimmed and combed above the collar. The court of appeals held the claim that the policy constituted an invasion of Fagan's privacy and liberties did not present a federal question and such requirement did not constitute unlawful sex discrimination.

12. 481 F. 2d 1115 (1973).
13. 570 F. Supp. 1303 (1983).
14. Airlines with grooming policies included: Eastern, United, U.S. Air, American, Pan Am. [13, at 1307, f. 4].
15. 42 U.S.C. 2000.
16. Congress reversed *Wards' Cove Packing, Inc. v. Atonio* 490 U.S. 642 (1989) when it passed the *Civil Rights Act of 1991* Publ. No. 102-111, 105 Stat. 1071 which amended Title VII to provide that once a plaintiff makes out a prima facie case, the full burden of proof shifts to the defendant who must demonstrate business necessity to avoid liability. Id. 105(a) 105 Stat 1074-75, 42 U.S.C. 2000 e - 2(K) (1) (H).
17. Three major national organizations that set occupational health and safety standards—American National Standards Institute, National Institutes for Occupational Safety and Health, NIOSH—and OSHA all recommend that SCBAs should not be worn with facial hair that comes into contact with the sealing surface of a facepiece. OSHA regulations provide respirators shall not be worn when conditions prevent a good face seal. Such conditions may be a growth of beard. OSHA Respiratory Protection, 29 (F.R. 1910 - 134 (e) (5) (1).
18. 713 F. Supp. 244 (W.D. Tenn. 1989).
19. 971 F. 2d. 127 (8th Cir 1992).
20. The court cited *Kelley v. Johnson* 425 U.S. 238, 96 S. Ct. 1440, 47 L. Ed. 2d. 708 (1976). Where the issue was a county regulation limiting the length of county patrolman's hair. The U.S. Supreme Court held that the restriction did not violate any right guaranteed police by the Fourteenth Amendment. The court said the choice of an organization's dress and equipment for law enforcement personnel is entitled to the same sort of presumption of legislative validity as state choice to promote other aims within the state's police power. The question, the court declared, is not whether the state can establish a genuine public need for the specific regulations but whether the police can demonstrate that there is no rational connection between the regulation based as it is on the county's method of organizing its police force and promoting the safety of persons and property. Kelly had brought the action individually and as president of the Suffolk County Patrolmen's Association under the Civil Rights Act of 1971 (42 U.S.C. 1983).
21. 512 F. 2d 443 (1975).
22. 520 F. 2d 1212 (1975).
23. 379 F. Supp. 837 (1974).
24. Directive 13 said, among other things: Members will be clean shaven. Beards or Goatees will not be permitted. Sideburns: Neatly trimmed and close to the face.
25. As in Fitzpatrick, testimony was received about the Scott Air Pak a SCBA which primarily protects wearers from breathing particles and noxious or super heated gases and can also protect against facial burns from solid object of liquid. The basic components of the SCBA were the face mask, air hose and air tank. "The purpose of the face piece is to seal off the wearer's face from the fire ground atmosphere. The Scott Paks used by the Department operated on a demand system, i.e., air flows from the tank into the mask only when the fireman inhales" [p. 843].

    "The Scott Pak fulfilled its function only when the fireman achieved an adequate face piece seal, otherwise deadly or hot gases, particularly matter from the atmosphere

can penetrate the mask, potentially interfering with efficiency or causing injury or death. The effect of beards and sideburns up on face mask seals had been considered by the American National Standards Institute ANSI standard Z88.5 (7.5):"

"Device shall not be worn when physical conditions prevent a good face seal. Such conditions are growth of beard, sideburns, unusual facial contours, skull cap that projects under the face piece" [p. 843].

Direct reprint requests to:

Dr. Sharlene A. McEvoy
198 Emmett Ave.
Darby, CT 06418