

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANK J. KLEINSORGE, )  
 )  
 Plaintiff, )  
 )  
 vs. ) CIVIL ACTION No. 99-5025  
 )  
 EYELAND CORPORATION, )  
 )  
 Defendant. )

**MEMORANDUM**

Padova, J. January , 2000

This matter arises on Defendant's Motion to Dismiss, filed December 6, 1999. Plaintiff filed an Opposition on December 17, 1999. For the reasons that follow, the Court will grant Defendant's Motion, and dismiss this action.

**I. BACKGROUND**

On or about March 5, 1999, Defendant hired Plaintiff as an optometrist to work in Defendant's Stroudsburg, Pennsylvania store. Plaintiff and Defendant executed an employment contract which provided that Plaintiff's employment was for a term of one year, and was terminable by Defendant for cause. During the course of his employment, Plaintiff wore a small earring to work. On or about April 12, 1999, the Store Owner, Scott Messinger, requested that Plaintiff refrain from wearing an earring at work. Wayne Potts, Plaintiff's immediate supervisor, however, allegedly stated that he personally did not "have any problem" with Plaintiff's continued use of an earring. Plaintiff continued to wear the earrings to work. On or about April 20, 1999, Defendant terminated Plaintiff for wearing earrings at work. Female employees of Defendant are permitted to wear earrings.

Plaintiff filed this action on October 12, 1999. Plaintiff brings Count I pursuant to Title VII of the Civil Rights Act of 1962, 42 U.S.C. §2000e et seq. The remaining three counts bring state law

causes of action: (1) Count II- breach of contract; (2) Count III- fraud and misrepresentation; and (3) Count IV- promissory estoppel.

## **II. STANDARD**

The purpose of a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) is to test the legal sufficiency of the Complaint. Winterberg v. CNA Ins. Co., 868 F. Supp. 713, 718 (E.D. Pa. 1994), aff'd, 72 F.3d 318 (3d Cir. 1995). A claim may be dismissed under Rule 12(b)(6) only if it appears beyond doubt that the plaintiff could prove no set of facts in support of the claim that would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957). In considering such a motion, a Court must accept all of the facts alleged in the Complaint as true and must liberally construe the Complaint in the light most favorable to the plaintiff. ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994); Robb v. City of Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984); Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686 (1974). The question is not whether the plaintiff will ultimately prevail, but whether he is entitled to present evidence in support of his claims. Scheuer, 416 U.S. at 236, 94 S. Ct. at 1686.

## **III. DISCUSSION**

Defendant moves to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Defendant argues that a different grooming standard for men than for women does not support a Title VII claim. With respect to Count II, Defendant contends that Plaintiff was an independent contractor, and therefore, terminable at-will. On Count III, Defendant submits that Plaintiff was not Defendant's employee, and therefore, there was no fraud or misrepresentation concerning his employment. Similarly, Defendant argues that Plaintiff cannot bring a promissory estoppel claim due to his status as an independent contractor. Alternatively, Defendant asks the Court to decline to exercise supplemental jurisdiction over the state law claims.

## A. TITLE VII

Circuits which have considered the issue of different grooming requirements for male and female employees have held that an employer has a right to establish and enforce different grooming requirements. In Knott v. Missouri Pac. Ry. Co., 527 F.2d 1249, 1252 (8th Cir. 1975), the United States Court of Appeals for the Eighth Circuit summarized the case law governing sex-based grooming standards. The Eighth Circuit held that “minor differences in personal appearances regulations that reflect customary modes of grooming do not constitute sex discrimination within the meaning of §2000e-2.” Id. at 1252. Furthermore, in a case directly on point, the United States District Court for the Eastern District of New York held that terminating a male employee for refusing to remove an earring does not state a claim for sex discrimination under Title VII. Capaldo v. Pan American, No. 86CV1944, 1987 WL 9687, at \*2 (E.D. N.Y. Mar. 30, 1987)(citing cases); see also Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385, 1387 (11th Cir. 1998)(grooming policy prohibiting men, but not women, from wearing long hair does not violate Title VII); Bellissimo v. Westinghouse Electric Corp., 764 F.2d 175 (3d Cir. 1985)(holding that “dress codes are permissible under Title VII as long as they, like other work rules, are enforced even-handedly between men and women, even though the specific requirements may differ.”).

The facts alleged here are analogous to the above cited cases. Plaintiff alleges that his employer maintained a grooming code for men which differed from the grooming code for women; and that he was discharged for failing to comply with the standards governing jewelry. Plaintiff does not allege that Defendant's grooming policy was unevenly applied. In this regard, he does not mention any other male employees who were permitted to wear earrings. Nor does Plaintiff contend that as between male and female employees the applicable grooming standards are unevenly enforced. As such, Plaintiff's claim falls outside Title VII's purview.

Plaintiff's reliance on Doe by Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1995), is misplaced. In Doe, the plaintiff, a male employee who wore an earring to work, was verbally harassed in an explicitly sexual fashion. The plaintiff pointed to the earring, and "his co-workers' apparent belief that an earring was a feminine accoutrement not suitable for male adornment, as evidence that his gender had something to do with the harassment heaped upon him." Id. at 583. Indeed, the Seventh Circuit itself recognized that the case law grants an employer "a certain amount of latitude to adopt employee grooming standards that are not entirely gender neutral." Id. at 582. The Court of Appeals, however, distinguished Doe from this jurisprudence, stating "these cases are entirely inapposite here. H. Doe is not suing Belleville in order to challenge a workplace rule that forbade him from wearing an earring." Id. In the instant case, however, Plaintiff is pursuing exactly this legal theory. Title VII does not support such a theory. Accordingly, the Court will grant Defendant's Motion to Dismiss as to Count I.

#### **B. SUPPLEMENTAL JURISDICTION**

In the remaining counts, Plaintiff brings various common law claims. Under 28 U.S.C. §1367, a federal district court may decline to exercise its supplemental jurisdiction over state law claims if all federal claims are dismissed. 28 U.S.C. §1367(c)(3); Growth Horizons, Inc. v. Delaware County, Pa., 983 F.2d 1277, 1285 n. 14 (3d Cir. 1993). In this regard, the Third Circuit Court of Appeals has explained that "where the claim over which the district court has original jurisdiction is dismissed before trial, the district court must decline to decide the pendent state claims unless considerations of judicial economy, convenience, and fairness to the parties provide an affirmative justification for doing so." Borough of West Mifflin v. Lancaster, 45 F.3d 780, 788 (3d Cir.1995). The Court perceives no such affirmative justification here. Because the Court is granting Defendant's Motion to Dismiss as to the only federal claim in this case, the Court will decline to exercise

supplemental jurisdiction over Plaintiff's remaining state law claims. Accordingly, the Court will dismiss Counts II - IV without prejudice.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANK K. KLEINSORGE, )  
 )  
 Plaintiff(s), )  
 )  
 vs. ) CIVIL ACTION No. 99-5025  
 )  
 EYELAND CORPORATION, )  
 )  
 Defendant(s). )

**ORDER**

AND NOW, this            day of January, 2000, upon consideration of Defendant's Motion to Dismiss, and Plaintiff's Opposition thereto, **IT IS HEREBY ORDERED** that

1. Defendant's Motion to Dismiss (docket # 3) is **GRANTED**;
2. Count I is **DISMISSED** in accordance with the Memorandum entered this date;
3. Counts II-IV are **DISMISSED** without prejudice pursuant to 28 U.S.C. §1367(c)(3);

and

4. This case is **CLOSED** for statistical purposes.

BY THE COURT:

---

John R. Padova