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The Legality of Tattoo Discrimination in Employment

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Background

In recent years, tattoos have become increasingly popular as a form of body art in the United States. According to a 2019 survey, 30% of Americans have at least one tattoo, an increase from 21% in 2012. However, even as tattoos are now recognized as part of mainstream culture, many people are still judgmental towards tattoos due to their negative connotations, associating them with risky behavior, criminality, or gangs. As a result, people with tattoos are often concerned that their body art will hinder their chances of employment. Though a recent study argues that in practice "tattoos are not significantly associated with employment or earnings discrimination," other research has shown that body art can be a source of employment discrimination, and individuals have indeed been dismissed from their jobs because of their tattoos.

I. Current Legislation

Is it legal for employers to discriminate against prospective or actual employees with tattoos? Currently, Title VII of the Civil Rights Act of 1964 protects employees and job applicants from employment discrimination based on race, color, religion, sex and national origin, but does not yet prohibit discrimination based on tattoos or other forms of body art. In addition, federal law allows employers to establish dress codes and grooming policies that require employees to cover up their

tattoos in the workplace, as long as they are applied consistently and adhere to the Equal Employment Opportunity Commission's guidelines. For instance, employers can order all employees to cover up visible tattoos, but cannot apply such a rule only to males or people of a certain ethnicity.

On September 29th, 2022, New York City Councilman Shaun Abreu introduced a new bill that would amend New York's administrative code and prohibit employment, housing, and public accommodations discrimination on the basis of having a tattoo. It would create an exception for employment and apprentice training programs in which covering a tattoo is a *bona fide occupational qualification,* a vocational qualification that is reasonably necessary to carrying out a particular job function in the normal operation of a business or apprentice training program, and where there exists *no less discriminatory means* of satisfying the qualification. The bill does allow for additional exceptions, but it does not specify what those might be in its current draft language. For instance, the bill may still permit employers to discriminate against employees and applicants with tattoos featuring hate speech. Currently, the bill has been referred by Council to the Committee on Civil and Human Rights. Though Abreu's new bill is certainly a progressive step, unfortunately no existing legislation—federal, state, or municipal—prohibits the discrimination against people with tattoos in the workplace.

II. Does banning tattoos in the workplace violate the First Amendment?

The most powerful argument against tattoo discrimination is that it is a violation of Americans' First Amendment rights. According to Councilman Abreu, "tattoos are a form of *personal self-expression* that, too often, incur bias and discrimination from employers, landlords and service providers." Tattooing can be seen as artistic creation. Bearing a tattoo on one's skin also makes a strong statement about one's personality and identity, and thus can also be a form of personal expression. Therefore, tattoos could be considered *free speech* protected under the First Amendment, and thus ordering employees to cover up their tattoos is an infringement of freedom of speech. However, it should be noted that the First Amendment does not apply to private employers. It states that "Congress shall make no law […] abridging the freedom of speech," thus only regulating the government. In other words, even though tattoos constitute free speech, private employers would not be violating the First Amendment if they ban tattoos in the workplace.

The First Amendment argument has indeed been used against governmental restrictions on tattooing. In *Yurkew v. Sinclair* (D. Minn. 1980), commercial tattooist David Yurkew challenged the refusal of the Minnesota State Fair to rent space

for commercial tattooing at the fair. Yurkew contended that tattooing is an art form and that the process of creating a tattoo is protected First Amendment activity. The defendants disputed this claim, arguing instead that protection of the health of fair patrons and consumers justifies the exclusion of tattooing from the fair. In the end, the court ruled against Yurkew and held that the "actual process of tattooing [...] is not sufficiently communicative in nature as to rise to the plateau of important activity encompassed by [the] First Amendment."

In more recent years, courts have gradually come to recognize tattooing as a form of free speech. The *Yurkew v. Sinclair* rationale was rejected in *Buehrle v. City of Key West* in 2015, when the United States Court of Appeals for the Eleventh Circuit determined that "the act of tattooing is artistic expression protected by the First Amendment, as tattooing is virtually indistinguishable from other protected forms of artistic expression; the principal difference between a tattoo and, for example, a pen-and-ink drawing, is that a tattoo is engrafted onto a person's skin rather than drawn on paper." In addition, in *Anderson v. City of Hermosa Beach* (2010), the United States Court of Appeals for the Ninth Circuit held that "in matter of first impression, [the] tattoo itself, [the] process of tattooing, and [the] business of tattooing are First Amendment protected forms of *pure expression*." In *Coleman v. City of Mesa* (2012), the Supreme Court also ruled that a "tattoo itself is *pure speech*, and the process of tattooing is also expressive activity for First Amendment purposes." In sum, according to the federal courts' latest jurisprudents, tattoos and the act of tattooing are now forms of expression protected by the First Amendment.

So, a question arises: would federal employers be infringing on First Amendment rights if they ordered employees to cover up tattoos? Currently, many governmental jobs have restrictions on tattoos, though they vary in strictness; for example, the Connecticut State Police requires that no tattoo should be visible while on-duty in the summer uniform, while the New York State Police allows the exception of a single band tattoo on one finger, and both police departments prohibit offensive or extremist tattoos. What is the legal ground for such restrictions?

In *Medici v. City of Chicago* (2015), police officers alleged that the city's policy requiring on-duty officers to cover their tattoos violated their First Amendment rights. The Court recognized the officers' tattoos as a form of personal expression, but held that a government employer can enact "certain restraints on the speech of its employees, restraints that would be unconstitutional if applied to the general public." Moreover, the Court supported the Chicago Police Department's (CPD) "interest in ensuring that professionalism and uniformity is maintained," and granted that "due to a tattoo's unique character," allowing on-duty police officers to display their tattoos "would undermine the CPD's ability to maintain the public's

trust and respect, which would negatively impact the CPD's ability to ensure safety and order." Thus, in the federal sector, employers are also allowed to ban tattoos in the workplace.

III. Inherent Discrimination

Through a close analysis of regulations and legal cases, we see that it is in fact legal to discriminate against tattoos in the workplace, both in private and federal sectors. This is to say, under current legislation, employers are allowed to use tattoos as a basis to distinguish candidates, and can require employees to cover up tattoos while on the job.

In *Yurkew v. Sinclair* (1980), the State Fair refused to rent space to a tattoo artist because it saw tattooing as a dangerous procedure which could cause the "transmission of communicable disease such as hepatitis." In the following decades, tattooing has been proved to be safe under sterilized conditions, and the public has become more accepting of tattoos. However, thirty-five years after *Yurkew,* in *Medici v. City of Chicago,* the Court still held that "an on-duty police officer's public display of any tattoo imaginable may, among other things, cause members of the public to question whether allegiance to their welfare and safety is paramount." This in truth reflects people's inherent bias towards tattoos, still seeing them as negative reflections on one's character, which is contrary to the reality at present: though tattoos might have once been symbols of gang affiliation or risky conduct, nowadays they are more a form of personal expression with a variety of meanings.

Is forcing servers or police officers to cover their tattoos really necessary for them to fulfill their duties? Are all people with tattoos really more risk-taking or less trustworthy? As Abreu proposed in his new bill, employers should be required to justify their restrictions on tattoos, and prove that covering a tattoo is the least discriminatory way to fulfill necessary vocational qualifications. Though federal jobs might require employees to adhere to stricter rules, employers should nevertheless reconsider the requirements in a contemporary setting.