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"Lookism": The Next Form of Illegal Discrimination

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A new book was released this summer authored by Stanford law professor Deborah Rhode. Its title: *The Beauty Bias* (New York: Oxford University Press, 2010). Professor Rhode's thesis is that a bias toward attractive employees (or against unattractive ones) should be illegal. Rhode likens a preference for good-looking employees to attempts to justify racism by arguing that customers would go elsewhere if served by a minority employee. Rhode points out that, with respect to race discrimination, "Congress and the courts recognized that the most effective way of combating prejudice was to deprive people of the option to indulge in it." She argues that the same should occur with respect to discrimination based on appearance.

Rhode is not alone in addressing this issue. Appearance discrimination has been a topic of debate lately in the popular media as well as in academia. *Newsweek* ran a special report in July entitled "The Beauty Advantage." It addressed the case of the employee who sued Citibank recently, claiming that she was fired for being *too* attractive. It also reported a survey of hiring managers, 57% of whom said qualified but unattractive candidates will have a harder time landing a job. The articled fretted that "when it comes to the workplace, it's looks, not merit, that all too often rule."

All of this recent attention is causing some to believe that a bias in the workplace against the unattractive should be illegal if it's not already. But while it is easy to make the academic argument for a law against appearance discrimination, it's much more difficult to draft a law that in the real world could effectively address something so subjective as the perception of beauty. Perhaps this is why it has not been attempted yet – and why it's not likely to happen.

Appearance Discrimination Is Lawful In Most Instances

As Rhode recognizes, discrimination based on attractiveness is *not* currently illegal in most instances. Only a handful of jurisdictions presently have laws prohibiting employment discrimination based on appearance. The District of Columbia's statute prohibiting discrimination includes "personal appearance" as a protected category. Santa Cruz, California has an ordinance prohibiting discrimination based on "physical characteristics." Michigan's anti-discrimination statute includes height and weight as protected categories, as does a San Francisco ordinance. No other U.S. jurisdiction has a law directly addressing discrimination on the basis of employee appearance.

Appearance discrimination may be attacked under existing anti-discrimination laws, but in only limited circumstances. A plaintiff over 40 who is rejected in favor of a more attractive employee or applicant who also happens to be younger might have a viable claim for age discrimination, provided there is evidence that management expressed a preference for a *younger* and more attractive

candidate. A pregnant employee who loses her job or a choice assignment because of her employer's expressed concern about her weight or appearance may have a claim as well. For example, two former models on "The Price Is Right" television show have sued this year, alleging that they were terminated after becoming pregnant and following comments about their weight and appearance. In these situations, however, it is the employee's age or pregnancy that is really the basis for the claim, not her looks.

Mere unattractiveness will not qualify as a disability within the meaning of the Americans with Disabilities Act. The definition of "impairment" under the ADA includes "cosmetic disfigurement," but it excludes ordinary physical characteristics such as height, weight, eye color, hair color and the like. Most cases to date in which unattractiveness has been the basis for an ADA claim have involved severe disfigurements or extreme obesity. According to the EEOC, only morbid obesity (defined as weight that is 100% in excess of the body norm) qualifies as an impairment, as does obesity that results from some physiological disorder such as hypertension or a thyroid condition. Being merely overweight or homely will not likely trigger ADA coverage, however.

The most popular means of attacking appearance discrimination to date has been to characterize it as a form of sex discrimination. Most of these attempts have been unsuccessful, though. Proponents of this theory often invoke case law from the 1970s and 1980s which struck down the notion that only sexy young women could serve as airline stewardesses, but they ignore the context out of which those cases arose. In *Diaz v. Pan American World Airways*, 442 F.2d 385 (5th Cir. 1971), the court held that being female is not a bona fide occupational qualification (BFOQ) for serving as a flight attendant, even though the overwhelming number of airline customers surveyed at that time preferred female flight attendants. It reasoned that while certain personality traits may be required to make a good flight attendant, some men may have those traits and there is no justification for excluding men from the position. In *Wilson v. Southwest Airlines*, 517 F. Supp. 292 (N.D. Tex. 1982), the airline argued that "female sex appeal" was a BFOQ for flight attendants and that employing only attractive female flight attendants was essential to the success of its business. The court rejected this argument, holding that sex appeal on the part of flight attendants is only tangential to the essence of the business of an airline, which is to provide safe transportation of passengers.

Those who cite cases such as *Diaz* and *Wilson* in arguing that a preference for attractive employees amounts to sex discrimination miss an important point. Those cases involved employers that refused to hire men for the jobs in question (and indeed the plaintiffs in those cases were men). The issue in those cases was whether the complete exclusion of men from flight attendant jobs could be justified as a BFOQ — *not* whether an employer could prefer attractive employees over unattractive ones (regardless of gender) without committing unlawful sex discrimination.

Likewise with respect to the cases that struck down weight limits for flight attendants. They do not hold that an airline cannot require flight attendants to meet weight standards, or that a preference for non-obese employees is unlawful. Rather, they hold only that an employer cannot apply weight standards to females but not to males, or apply a more stringent standard to females than to males. This distinction was highlighted more recently by the Ninth Circuit in *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006)(en banc). The court in *Jespersen* held that an employer's requiring female but not male employees to wear makeup was not unlawful sex discrimination because all employees were required to meet dress and grooming standards even though slightly different appearance requirements were applied to women versus men.

A California Supreme Court case, *Yanowitz v. L'Oreal USA, Inc.*, 32 Cal. Rptr. 3d 436 (Cal. 2005), is sometimes cited for the proposition that a manager's preference for a more attractive female employee is unlawful sex discrimination, but the case does not hold that. The plaintiff in *Yanowitz* was a manager in a fragrance and cosmetics company who refused her boss' orders to fire a fragrance saleswoman because he thought she was not "good looking enough" and to "get me somebody hot." The plaintiff later sued, claiming she had been retaliated against for refusing an order that she reasonably believed to amount to unlawful sex discrimination. While the California Supreme Court held that the plaintiff was entitled to a trial on her retaliation claim, it maintained: "[W]e have no occasion in this case to determine whether a gender-neutral requirement that a cosmetic sales associate be physically or sexually attractive would itself be" unlawful discrimination.

Ought There Be A Law?

A law against appearance discrimination would raise several troubling issues.

First, who will qualify as unattractive enough to sue? A bizarre exchange of assertions is likely to occur in court. The employer will argue: "She's not ugly enough to qualify for the law's protection." The plaintiff will counter: "Oh yes I am!" As virtually everyone feels they could be more attractive, it seems that a prima facie case would require proof of a certain minimum standard of unattractiveness. But from where will such a standard come? Will the Equal Employment Opportunity Commission conduct a rulemaking proceeding to establish a national standard of unattractiveness? Given the difficulty that agency has had in defining who is "disabled" under the ADA, this option does not seem promising. Will it instead be left to judges and juries to decide on a case by case basis who is sufficiently homely to invoke the law's protection? Will beauty contest judges have to be retained as expert witnesses to provide guidance in such cases?

Second, once a few employers get hit with seven-figure verdicts in "lookism" lawsuits, what will be the effect on the workplace? Professor Rhode lauds the effect that sexual harassment laws have had on today's workplace, producing litigation that has led employers to adopt policies and conduct training of employees (and has led many employees to be terrified of being friendly to one another). All of this, according to Rhode, has "helped to reshape understandings of unacceptable conduct." Would the same thing happen if a law against appearance discrimination were enacted? Will homeliness become a criteria for hiring goals under affirmative action plans? Will employers committed to diversity proudly boast of their success in hiring significant numbers of the unattractive? Will attractive job applicants attempt to downplay their good looks, so as not to be rejected by employers fearful of lawsuits? Will employees who sense they are about to be terminated intentionally gain weight or let their appearance decline so that they will fit within the law's protection when they are fired?

Is beauty bias in the workplace really a problem worthy of being addressed by the nation's civil rights laws? Rational employers in today's highly competitive economy are not likely to hire or promote people based solely on their looks, unless good looks are required for the job. A beautiful face or a svelte body may be essential for some jobs such as modeling, fitness training, and selling cosmetics, but much less important than experience, aptitude and know-how for most other jobs. One wonders how many hiring managers would really select a gorgeous but incompetent applicant over a less attractive but highly-skilled candidate. Among two equally-qualified candidates the better-looking one may well get the nod, but should the other one be entitled to damages? The noble purpose of the laws requiring equal employment opportunity is already undermined by too many frivolous lawsuits. These laws would only be further trivialized by allowing employees who do not succeed at work to blame it on their looks.

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