Beauty And The Bias

Insights
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The controversy over discrimination in employment based on appearance is heating up again. *Newsweek* recently ran a special report entitled "The Beauty Advantage" that included a survey of hiring managers, 57% of whom said qualified but unattractive candidates will have a harder time landing a job. More than half of the managers in the survey advised job applicants to invest time and money in "making sure they look attractive" instead of on polishing a resume. In addition, Stanford law professor Deborah Rhode has authored a new book entitled *The Beauty Bias* that decries appearance discrimination and urges legal reforms to prohibit it.

The premise of much of this debate is that a "beauty bias" in the workplace is wrong and should be illegal if it isn't already. In fact, discrimination based on attractiveness is *not* illegal in most instances. Moreover, while it is easy for academics to posit that appearance discrimination should be unlawful, it is much more difficult to draft a law that could effectively address something so subjective as the perception of beauty.

How The Legal Landscape Looks
Only a few jurisdictions presently have laws prohibiting 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 directly addresses the issue.

Appearance discrimination may be attacked under existing anti-discrimination laws in only limited circumstances. An applicant 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* as well as more beautiful candidate. A pregnant employee who loses her job or choice assignments 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. But in these situations, it is the employee's age or pregnancy that is really the basis for the claim, not looks.

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Mere unattractiveness will not qualify as a disability within the meaning of the Americans with Disabilities Act. The definition of "impairment" under the ADA 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 disfigurements or extreme obesity. The EEOC takes the position that "severe" 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. But just being overweight or homely will not likely trigger ADA coverage.

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*, 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*, 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.

So too 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 somehow 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 in *Jespersen v. Harrah's Operating Co.*, which 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 decision, *Yanowitz v. L'Oreal USA, Inc.*, 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's orders to fire a fragrance saleswoman because he thought the salesperson was not "good looking enough" and to "get me somebody hot." The manager 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 manager 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.

How To Makeup A Lawsuit

It's easy to say there ought to be a law against beauty bias in the workplace, but whether a cause of action for appearance discrimination is created by statute or read into existing anti-bias laws, several troubling issues would be presented. 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!"

Will a prima facie case require proof of a certain standard of unattractiveness? Where will such a standard come from? Can the EEOC be relied upon to establish national standards of unattractiveness? Or will it be left to judges and juries to decide on a case-by-case basis? Will beauty contest judges have to be retained as expert witnesses in these cases?

Then, once a few employers get hit with seven-figure verdicts in "lookism" lawsuits, what will be the effect on the workplace? 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 let their appearance decline so that they will fit within the law's protection when they are fired? These questions illustrate why extending civil rights protections based on vague and subjective criteria is a bad idea.

More importantly, is beauty bias in the workplace a problem for anyone other than academics? In the real world, rational employers are not likely to hire or promote people based solely on their looks, unless appearance is integrally related to the job. Good looks are important for some jobs such as modeling, fitness training, and selling cosmetics. The argument that allowing an employer to bow to customer preference for attractive people in these types of jobs is the equivalent of attempting to justify race discrimination via customer preference and is just silly.

Looking Into The Mirror

Critics of beauty bias argue that all discrimination based on immutable characteristics is wrong and should be illegal. There are two problems with this argument. One is that attractiveness is not necessarily immutable. A different haircut, a fitness regimen, or a new outfit often can make a big difference in how attractive a person is perceived to be. Two is that employers routinely discriminate based on immutable characteristics such as intelligence, talent and aptitude, and they do so lawfully. Not everyone is smart enough to graduate at the top of their class, or talented enough to play professional sports or in the symphony orchestra, or possesses the traits to be a successful salesperson. The fact that they have fallen short in terms of the immutable characteristics necessary for success in these fields may be heartbreaking, but it is hardly the basis for a lawsuit.

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