Insights, News & Events

"HERE'S LOOKING AT YOU, KID" - THE EEOC LOOKS FOR BEAUTY BIAS

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The EEOC is currently investigating Marylou's Coffee, a chain of Massachusetts coffee shops, for its practice for hiring young attractive women to serve coffee. The EEOC's investigation was not triggered from a complaint by a rejected applicant or fired employee. Rather, it is a "Commission-initiated investigation" conducted, according to the director of the EEOC's Boston office, because "it's possible that applicants or employees might not know that they have been discriminated against."

Aside from whether it is a good idea to spend agency resources conducting an investigation where there has been no complaint, the EEOC's big adventure raises a more troubling question: Is the EEOC trying to establish that it is illegal for an employer to prefer attractive employees over unattractive ones? Clearly it would be unlawful for an employer to hire only young persons, or applicants only of a particular race or ethnicity. But assuming no such obvious forms of discrimination are occurring, may an employer hire only good-looking employees?

Only a handful of jurisdictions presently have laws prohibiting employment discrimination based on appearance. The District of Columbia's anti-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

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addressing employment discrimination based on appearance.

HOW TO LOOK AT THE PROBLEM

Mere unattractiveness does not qualify as a disability under the Americans with Disabilities Act. The ADA's definition of "impairment" includes cosmetic disfigurements 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 a thyroid condition. But merely 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 flight attendants, but they ignore the context out of which those cases arose.

In *Diaz v. Pan American World Airways,* a leading case in the 1970s on the subject, thecourt 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.

Those who cite cases such as *Diaz* 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 cases that struck down weight limits for flight attendants. They did not hold that an airline cannot require flight attendants to meet weight standards, or that a preference for non-obese employees was unlawful. Rather, they held 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.

A 2005 California Supreme Court case, *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' orders to fire a fragrance saleswoman because he thought she 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 plaintiff was entitled to a trial on her retaliation claim, it stopped short of finding that unlawful discrimination had occurred: "[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.

SOME UGLY SCENARIOS

Several academics, including Stanford law professor Deborah Rhode and University of Texas economics professor David Hamermesh, recently have advocated that discrimination based on looks should be illegal. In an article in the New York Times last year, Hamermesh argued that ugliness could be protected by "small extensions" of the ADA. "We could even have affirmative-action programs for the ugly," he proposed.

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.

First, who will qualify as unattractive enough to sue? A bizarre argument is likely to occur in court. The employer will contend: "She's not homely enough to qualify for the law's protection." The plaintiff will counter: "Oh yes I am!" A prima facie case would seem to require proof of a certain minimum standard of unattractiveness, but from where will such a standard come? Will the EEOC conduct rulemaking 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? A federal judge in Nevada recently rejected a beauty-bias lawsuit, noting that the court could not "discern a standard by which a jury would determine Defendant's notion of attractiveness. It hardly needs to be said that beauty is in the eye of the beholder."

Second, once a few employers got hit with seven-figure verdicts in "lookism" lawsuits, what would 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 that has led many employees to be terrified of being friendly to one another).

Would the same thing happen if a law against appearance discrimination were enacted? Would homeliness become a criteria for hiring goals under affirmative action plans? Would 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?

WHY THE FUSS?

Is beauty bias in the workplace really a problem worthy of the EEOC's attention? Most rational employers 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 fit body may be required for jobs such as modeling, fitness

training, and cosmetics sales, but these qualities are 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 if that happens should the other one be entitled to damages? Although extending the laws against discrimination to cover bias against the unattractive would seem neither feasible nor wise, it remains to be seen whether the EEOC or some state legislatures might try it nonetheless.

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