

Hello, I recently came across an article with the Society of Human Resources Group about appearance and your job search and I thought it was interesting enough to share with you.

When does concern with employees appearance become illegal discrimination?

Should employees' looks affect their job prospects and employment? In some cases, employers argue that appearance is a job-related factor. And, as a purely practical matter, we all tend to like people whom we find attractive, which can influence employment decisions—either overtly or discreetly.

“At one point, if you weren't young and blond and cute, you weren't a [bank] teller,” recalls Shawna O'Dell, SPHR, former vice president of HR at Citizens Bank & Trust Co. in Ardmore, Okla. “We liked to hire happy, shiny people. Our managers did have some biases” about the ideal candidate's looks, without taking into account their skills in handling money, she says.

O'Dell herself admits falling prey to considering appearances when evaluating candidates. “I was guilty of watching how someone walked. If they walked quickly and had that appearance of confidence, I thought they'd be a good candidate.”

Since then, the bank has made a conscious effort to hire beyond the “young and blond and cute” pool, she says.

“We became conscious that we needed to look at minority applicants, someone different. I think we have a pretty diverse group of people who work here now,” says O'Dell, who recently resigned her position.

At many other organizations, however, attractiveness continues to play a significant role in many employment-related decisions—especially for individuals who are the public face of the company, says Patrick Hicks, an attorney in the Las Vegas office of national employment law firm Littler Mendelson. “Everything else being equal, certain businesses—retail is the best example—would prefer people who are physically attractive.”

Jennifer Fowler-Hermes, an attorney with Kunkel Miller & Hament in Sarasota, Fla., says, “For most of the clients I work with, appearance as a general concept doesn't influence most of their decisions. They want to pick the most qualified person for the job.” But, she adds, “if a person's appearance may interfere with their ability to do that job” because it makes customers uncomfortable, they're probably not going to hire that person.

Such a strategy is not entirely without legal risk, however. Although there is no federal law banning decisions based on appearance in general, most employers know better than to base employment decisions on appearance that is related to legally protected factors—such as race or age, for example.

What employers may not know is that employees' appearance still can qualify for legal protection in some other situations. For example, some local jurisdictions have passed laws that specifically protect workers

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from discrimination based on appearance. And some aspects of appearance, such as severe obesity or those related to gender roles or sexual orientation, can—in some situations—qualify for legal protection.

On the other hand, the nature of the business or of the job can play a role in determining how much latitude employers have in requiring a “certain look” for their employees.

This mix of factors can make it potentially confusing to determine what employers are legally entitled—or obligated—to do when dealing with employees’ appearance.

Selling Sex and Race

Can employers base hiring decisions on factors that might normally be protected—such as race or sex?

It depends on what you’re selling, says Sharona Hoffman, a law professor at Case Western Reserve University in Cleveland. “If you straight-out make the argument that what you’re selling is sex, you will be able to hire only women who are sexually appealing,” she says.

“And then sometimes the courts will allow exceptions for reasons of authenticity,” such as when a Chinese restaurant hires only Chinese waiters. In such cases, “the defense has been, ‘Part of our appeal is that we create an authentic environment. We have the correct decorations, and we need to have the correct waiters, because that’s what the customers pay for,’ ” she says. “Some courts have accepted such a defense; others haven’t. It’s a question of what is being sold—food alone or food plus atmosphere.”

Retail “is where employers run into trouble, because they will say, ‘The clients don’t like people with beards’ or ‘The clients only like to look at pretty women under 30,’ ” Hoffman says. “The courts have uniformly ruled that client preference is not a defense. If you really aren’t hiring people over 40 because you think the customers won’t like it, you’re going to lose. You can’t violate federal law [in this case, the Age Discrimination in Employment Act] just because you want to sell more jeans.”

But what if it’s not entirely clear whether appearance relates to the core business or merely customer preference? Say you’re selling jeans, but you think the youthful, hip atmosphere of your store is critical to its success in selling that product. Sometimes, “it comes down to a business decision: Do you think it’s going to do so much good for your company that you’re willing to take the risk?” says Talar M. Herculian, who practices employment law with Fisher & Phillips LLP in Irvine, Calif.

Obese Workers May Not Be Protected

Some employers may be reluctant to hire obese individuals, fearing that their appearance may bother customers. Generally, obesity is not afforded legal protection. For example, except for extreme cases, it is not considered a disability under the Americans with Disabilities Act (ADA).

Chicago employment attorney J. Kevin Hennessy says, “Mutable characteristics, things that you could change”—such as excess weight—“are basically not considered to be protected.”

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Nancy DeLogu, an attorney in Littler Mendelson's Washington, D.C., office, says, "You have to be extremely obese, or ill because of your obesity, to clearly fall under the ADA. There are going to be plenty of people who don't meet that requirement who are nevertheless quite overweight." (The ADA also bars discrimination against people who are perceived as disabled even though they aren't, and some obese people have pursued lawsuits based on such alleged misperceptions.)

"If anything, the trend is to narrow the definition of disability," says Hoffman. "There is a lot of resistance on the part of the courts to expanding disability and, certainly, to including conditions that the courts often think are the person's own fault: 'If he just didn't eat those french fries, he wouldn't look that way.'"

Only Michigan has an employment-discrimination law that specifically mentions weight, but it "hasn't shown up in court cases," says Miriam Berg, president of the Mount Marion, N.Y.-based Council on Size and Weight Discrimination. (For more information about obesity's effects on the workplace, see the March HR Magazine cover story, "**Countering a Weight Crisis.**")

The council is a nonprofit organization that aims to end discrimination based on size and weight, but Berg says pursuing statutory protections isn't even on the group's radar. "People are still confusing weight with health and thinking that skinny is always healthy, and fat is always unhealthy," she says. "Until we can separate those issues, we're not even going to work on [antidiscrimination] legislation."

However, some attorneys believe that today's heightened awareness of obesity may pave the way for such legislation in the future. "As more and more people fall into this group [the obese], I think there's more understanding and sensitivity to the fact that obese people are treated less favorably," says Hicks. "With that comes more sensitivity from the legislatures."

Hicks foresees greater protection for the obese through new statutes, as opposed to a more liberal interpretation of the ADA by the courts. "People are surprised to hear that it is not, in most jurisdictions and certainly under federal law, against the law to discriminate against somebody because they're obese," he says, and the reaction is, "That's not right."

Gender Roles and Sexual Orientation

Some statutory bans on discrimination tend more than others to involve questions of personal appearance. Herculian points to bans on discrimination based on sexual orientation. Personal appearance will inevitably "be part of that discussion," she says, because of the way gay men and lesbian women may dress.

It's an issue that has made its presence felt in federal courts. For example, in a landmark 1989 Title VII decision, the Supreme Court ruled in *Hopkins v. Price Waterhouse* that gender stereotyping in the workplace is illegal. Anne Hopkins had claimed she was terminated from her job at Price Waterhouse because senior partners perceived her dress and behavior as too masculine. This case is now being applied to allow claims by homosexuals and transgender individuals, as is *Kay v. Independence Blue Cross*, in which a federal trial court in Pennsylvania held that gay individuals can sue under Title VII alleging that they were discriminated against for not conforming to gender norms. (For more information, see the analysis of *Smith v. Salem* in the Court Report section of August's HR Magazine.)

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And it's an issue that has become increasingly complex in California, which last year passed Assembly Bill (AB) 196. The bill amends the state's Fair Housing and Employment Act. Originally aimed at protecting employees who undergo a sex-change operation, the new law wound up as a sweeping ban on sexual stereotyping.

AB 196 prohibits discrimination based on an employee's "identity, appearance or behavior, whether or not that identity, appearance or behavior is different from that traditionally associated with the [employee's] sex at birth."

The new law "is written so broadly that it gives an employee the right to look like a man or a woman on any given day, and you can't do anything about it," Herculian says. "Employers are going to panic every time a male employee shows up in stiletto heels, and in California that happens more frequently than you might think."

So far, AB 196 has not generated any lawsuits, much less definitive court rulings. "From an employer's standpoint, it's hard to anticipate what you could be sued for" under the new California statute, says Lynn Lieber, president of the San Francisco-based training firm Workplace Answers. "What is sexual stereotyping? Is it not hiring a male because they have a more feminine voice? Is sexual stereotyping [not hiring] a woman who has a really short haircut and is lesbian?"

Under local laws in other geographic areas, dealing with expected gender roles has already gotten employers into legal trouble, as the case of Patricia Underwood demonstrates. Underwood worked as a receptionist for the Washington, D.C., company Archer Management Services until she was fired, ostensibly because her position was being eliminated. She sued in federal district court, alleging in part that her dismissal violated a District of Columbia law barring employment discrimination based on appearance.

Underwood was a transsexual—a male who had undergone a surgical transformation into a female—and she complained that Archer had fired her because she retained some masculine traits. Such a termination, she argued, violated the law's ban on discrimination based on personal appearance. Archer's counterargument was that Underwood was really seeking protection based on her status as a transsexual—not a protected status under the D.C. law.

Judge Charles R. Richey held that Underwood could go to trial on her personal appearance claim.

Moving Forward

Contemplating the Underwood case, an employer might be forgiven for believing that a workplace where employees have the right to wear whatever they like and appear however they like—nose rings, dreadlocks and bright orange Mohawk haircuts included—lies just ahead.

Some employers seem to believe that now. "I see employers taking a hands-off approach and being more afraid to make demands of their employees, as to what they should and shouldn't wear," says Herculian.

Yet, while the Underwood case might appear to have opened the door wide to appearance-based claims, that hasn't been the case. Judge Richey handed down his decision 10 years ago, and it has not yet spawned

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a flood of such suits and judicial rulings in Washington, D.C., or elsewhere. In fact, the Underwood case itself never made it to trial, and there is no record of a settlement.

“We’re sort of waiting for the breakout case,” says attorney DeLogu.

Perhaps that case will arrive first in another jurisdiction. A sprinkling of other states and cities now have laws barring discrimination based on appearance: For example, San Francisco bars discrimination based on height and weight, and Santa Cruz, Calif., has a sweeping ban on appearance discrimination.

“I think more people feel, on a policy level, that appearance discrimination is just wrong,” DeLogu says. “The question is where the law is going to go with that.”

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