A low-angle, blue-tinted photograph of the Statue of Liberty. The statue's right arm is raised, holding the torch aloft. The crown with its seven spikes is prominent. The background is a clear, deep blue sky.

The Federal Lawyer

Nov/Dec 2010

Volume 57

Number Ten

Immigration Law

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Appearance: A New Protected Class Under Title VII?

Research suggests that one's appearance matters in modern society. Studies have shown that good-looking students tend to receive higher grades than their less attractive counterparts.¹ Similarly, "plain-looking" individuals earn 5 to 10 percent less than "average-looking" individuals, who in turn earn three to eight percent less than "good-looking" people.² Height can also affect income, with each inch earning individuals \$700 or more per year.³ Research likewise reveals attractive people often receive better medical attention from doctors and lighter sentencing from the criminal justice system.⁴

The term "appearance" encompasses a variety of attributes such as physical looks, personal style or dress, and physical characteristics (height, weight, eye color, and so forth). Even though it is widely recognized that society places significant value on appearance, many have started to question whether employers should be permitted to consider appearance (consciously or subconsciously) when making employment decisions. Some argue such judgments are merely a practical reality of life. However, claims of discrimination based on appearance are on the rise in the United States, sparking increasing debate over whether one's appearance deserves protection under federal law.

Appearance-based discrimination cases have recently received significant media attention. In Michigan, two Hooters restaurant waitresses sued claiming they were fired for being overweight.⁵ In New York, a bank employee claimed she was terminated for being "too hot" and good-looking, a case which is now pending in arbitration.⁶ The claims in these cases arise under state

law. Numerous state and local governments have outlawed appearance discrimination on some basis including, among others, Michigan; New York; Illinois; San Francisco; Santa Cruz, Calif.; Madison, Wisc.; Birmingham, Ala.; and Washington,

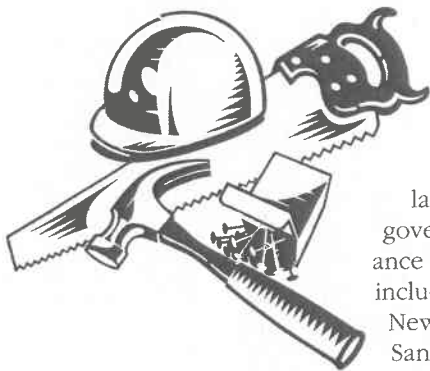
D.C. The vast majority of these state and local laws protects individuals against discrimination based on weight, height, and other immutable characteristics. In another recent case, *Keegan v. Delta Air Lines*, and *Jet Blue Airways*,⁷ a flight attendant filed suit in

the Western District of Pennsylvania alleging sex discrimination because she was denied a job assignment for not dressing provocatively enough.⁸ This demonstrates the infiltration of appearance-based claims into federal law.

The Current State of Federal Law

Title VII of the Civil Rights Act of 1964⁹, the Americans with Disabilities Act (ADA)¹⁰, the Age Discrimination in Employment Act (ADEA)¹¹, and the Genetic Information Nondiscrimination Act (GINA)¹² are important anti-discrimination laws afforded to employees under federal law. Together, these statutes prohibit discrimination based on race, color, religion, sex, national origin, disability, age, and genetic information. Discrimination based on appearance, which is not listed in any of those statutes as a protected classification, is not currently expressly prohibited by federal law.¹³ Accordingly, in order to successfully pursue an appearance-based discrimination claim under current federal law, an individual must successfully link an appearance-based discrimination claim with discrimination based on a class that is protected under Title VII, the ADA, the ADEA, GINA or some other federal statute.

Individuals, however, have had mixed success in couching their appearance discrimination claims as affecting categories protected under federal law. For example, the most common appearance-based discrimination claims that individuals have tried to bring under the ADA concern whether being overweight can be considered a disability. To be successful under the ADA, an individual must show that his or her physical or mental impairment substantially limits at least one major life activity, that he or she has a record of that type of impairment, or that he or she is perceived as having such an impairment.¹⁴ Both the First Circuit Court of Appeals in *Cook v. Rhode Island*¹⁵ and a federal district court in New York in *Butterfield v. New York State*¹⁶ have concluded that an individual's morbid obesity can be a disability under the ADA, as it substantially limited (and was perceived as being substantially limiting to) the plaintiffs' abilities to perform various job functions. However, not all such claims have achieved similar success. More recently, another federal district court, in Florida, determined weight was not protected under federal law, finding that "[o]besity, even morbid obesity ... does not constitute a physical impairment [under the ADA] unless it is the result of a physiological disorder or condition."¹⁷



While Title VII's protections against sex discrimination have been interpreted to prohibit appearance standards—such as dress codes that demean women¹⁶ or that unequally burden one sex over the other¹⁹—other discrimination claims concerning employment dress codes have not been as successful. In *Jespersen v. Harrab's Operating Co. Inc.*, a bartender was terminated for refusing to style her hair and wear makeup, which violated her employer's new "Personal Best" program.²⁰ While Jespersen felt that being forced to wear makeup was "degrading," the Ninth Circuit Court of Appeals upheld the employer's dress code finding it equally burdensome to women and men.²¹ The court further noted that while it supported Jespersen's right to be "true to herself," it feared what would result if it upheld her discrimination claim—"we would come perilously close to holding that every grooming, apparel, or appearance requirement that an individual finds personally offensive, or in conflict with his or her own self-image, can create a triable issue of sex discrimination."²²

Should Appearance Discrimination Be Federally Prohibited?

Even though a person's appearance is not currently a protected classification, there are those who contend that it should be, and there are multiple arguments both in support of, and in opposition to, a federal law on the subject. Those supporting such a federal law argue that allowing appearance discrimination can have adverse and unintended consequences within the employment setting and for society as a whole, as demonstrated by the above-cited statistical evidence. Permitting employers to make hiring and firing considerations based on appearance can create a subpar workforce if employers place less emphasis on the qualities that truly signify a good employee (such as educational background and prior accomplishments) and more emphasis on physical traits that are likely unrelated to possession of a good work ethic. Similarly, concerns that standards of beauty are culturally driven might lead to a workforce that is more homogenous and less diverse overall.²³ More generally, another concern is that allowing appearance discrimination claims could provide further support for a society that is already overly preoccupied with appearances.²⁴

Another issue is that there is no objective measure for attractiveness, because beauty is very much in the eye of the beholder. As one judge noted, "[n]o Court can be expected to create a standard on such vagaries as attractiveness or sexual appeal."²⁵ Also without clear standards, employers will be unable to properly assess the risk of particular employment decisions, ultimately hindering those decisions. In fact, "[t]he less cohesive and identifiable (and the more amorphous) a group characteristic is, the more it arguably intrudes on the freedom of employers to make decisions without fear of liability for violating an employ-

ment discrimination law."²⁶ Because appearance is such a broad concept, allowing appearance-type discriminatory claims could potentially create a glut of litigation, the extent of which is unknown.

Ultimately, many posit that a federal law prohibiting appearance discrimination will never come to fruition, as the law is neither intended, nor is it capable of, completely eradicating all discriminatory behavior.²⁷ After all, even many of the current federal laws prohibiting discrimination against specified individuals allow for exceptions, such as when a business necessity or bona fide occupational qualification exists. Likewise, with modern technological and medical advances, many attributes of an individual's appearance are increasingly being considered mutable, further decreasing the perceived need to protect against discrimination for such characteristics. Therefore, many argue, simply because some inequality may exist does not mean that there should be a federal law prohibiting it, contending that it may be that some forms of allegedly discriminatory behaviors should simply be chalked up as "minor indignities" suffered by us all.²⁸

Conclusion

With the rise of appearance-based litigation, employers, employees, job applicants and their counsel must be cognizant of these types of claims. Therefore, when implementing a dress code or making determinations that relate to, or in any way rely on, physical attributes of an employee or prospective employee, employers should make certain that they have a sound and objective rationale for their decisions. Similarly, employees and job applicants should realize that, if such standards affect an existing protected class, they may be unlawful and violate federal law. Only time will tell whether or not appearance discrimination will be a new protected class under federal law. **TFL**

Endnotes

¹Sharon Begley, *Beauty Before Brains*, NEWSWEEK, July 14, 2009, available at www.newsweek.com/2009/07/13/beauty-before-brains.html.

²Jeff E. Biddle and Daniel S. Hamermesh, *Beauty and the Labor Market*, 84 AM. ECON. REV. 1174, 1186 (1994); Kate Lorenz, *Do Pretty People Earn More?*, CNN.COM, July 11, 2005, available at www.cnn.com/2005/US/Careers/07/08/looks/.

³Rupert Taylor, *Good Looks Equal Success: Attractive and Tall People Get Better Jobs and Higher Pay*, SUITE101.COM, August 5, 2009, available at workplaceculture.suite101.com/article.cfm/good-looks-equal-success; Lorenz, *supra* note 2.

⁴Lorenz, *supra* note 2.

⁵See The Associated Press, *Judge Allows Hooters Waitress Weight Lawsuit*, available at www.msnbc.com.

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msn.com/id/38851219/, Aug. 25, 2010. See *Smith v. Hooters of Rosevill Inc.*, Macomb County, Michigan Circuit Court, Case No. 2010-00213, filed May 24, 2010; *Convery v. Hooters of Roseville Inc.*, Macomb County, Michigan Circuit Court, Case No. 2010-002340, filed June 2, 2010.

⁹Elizabeth Dwoskin, *Is this Woman too hot to be a Banker?*, June 1, 2010, available at www.village-voice.com/2010-06-01/news/is-this-woman-too-hot-to-work-in-a-bank/.

¹⁰No. 09-57 Western District of Pennsylvania.

¹¹*Id.*; See Joe Mandak, *Flight Attendant Sues Airlines over Sexy Dress*, USA TODAY, available at www.usa-today.com/travel/flights/2009-01-19-flight-attendant-sexy-dress_N.htm (last visited Oct. 27, 2010).

¹²42 U.S.C. §2000e (1994).

¹³42 U.S.C. § 12101 (1990).

¹⁴29 U.S.C. §§ 621-34 (1964).

¹⁵42 U.S.C. § 2000ff (2008).

¹⁶*Id.*

¹⁷29 U.S.C. § 794(a).

¹⁸10 F.3d 17 (1st Cir. 1993).

¹⁹1998 WL 401533 (S.D.N.Y. 1998).

²⁰*Middleton v. CSX Transp, Inc.*, 2008 WL 846121, at *2 (N.D. Fla. Mar. 28, 2008). See also *Smau v. Com. of Va. Dept. of State Police*, 862 F. Supp. 1469, 1471, 1475 (E.D.Va. 1994) (finding that an obese employee who was terminated from her position as state trooper due to her weight had no claim under the ADA because her weight was not perceived as a disability and did not substantially limit her ability to

seek employment).

²¹*EEOC v. Sage Realty Corp.*, 507 F. Supp. 599, 608 (S.D.N.Y. 1981).

²²*Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084, 1092 (5th Cir. 1975) (holding that having different hair length standards for men and women did not violate Title VII).

²³444 F.3d 1104 (9th Cir. 2006) (*en banc*).

²⁴*Id.* at 1111.

²⁵*Id.* at 1112.

²⁶See e.g., Ritu Mahajan, *The Naked Truth: Appearance Discrimination, Employment, and the Law*, 14 ASIAN AM. L.J. 165 (2007).

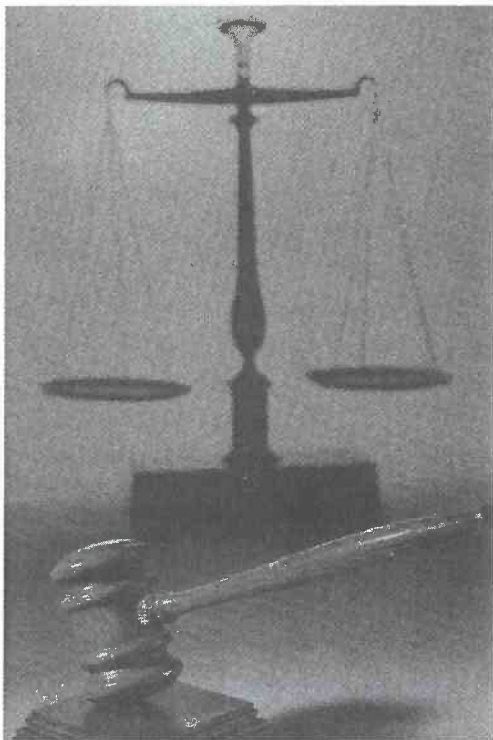
²⁷*Id.*

²⁸*Alam v. Reno Hilton Corp.*, 819 F. Supp. 905, 914 (D. Nev. 1993). See also *Heilman v. Memeo*, 2008 U.S. Dist. LEXIS 49760, at *8 (D. Nev. June 27, 2008) (expressing concern over expecting a court to create a standard of attractiveness).

²⁹William R. Corbett, *The Ugly Truth About Appearance Discrimination and the Beauty of Our Employment Discrimination Law*, 14 DUKE J. GENDER L. & POL'Y 153, 167 (2007).

³⁰See William R. Corbett, *The Ugly Truth About Appearance Discrimination and the Beauty of Our Employment Discrimination Law*, 14 DUKE J. GENDER L. & POL'Y 153, 171 (2007) (citing Larry Alexander, *What Makes Discrimination Wrong? Biases, Preferences, and Stereotypes*, 14 U. PA. L. REV. 149, 151 (1992)).

³¹*Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 305 (N.D. Tex. 1981).



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