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Lookism: New Forms of Discrimination

Appearance matters – at work and in life. Researchers at the University of Alberta, after observing more than 400 parent-child interactions occurring at supermarkets, determined that less attractive children were less cared for by their parents: they were belted into shopping carts less often and were more likely to be allowed to wander out of sight. The research team leader connected this to evolution, suggesting that better looking children get better care because they carry a more desirable genetic legacy.

While some challenge the validity of this "supermarket science," other sources support the view that appearance plays a critical role in how people are treated by other people. Researchers at Harvard Medical School and MIT report that the part of the brain that is affected when a man is shown pictures of an attractive woman's face is the same as is affected when a gambler sees money or an addict sees drugs. Studies focusing on the workplace have found that C.E.O.'s of Fortune 500 companies are, on average, considerably taller than the average American, and that workers who are tall, slender and attractive earn more money than their shorter, heavier and less attractive counterparts.

If appearance plays an ingrained part of our evaluations of other people, and attractiveness pays dividends in the workplace, is that a social reality that exceeds the reach of the law or a form of invidious discrimination that should be banned? The law on this point goes both ways.

The American Heritage Dictionary defines "lookism" as "discrimination or prejudice against people based on their appearance." Apparently adopting the view that lookism is invidious, the District of Columbia anti-discrimination law bans employment decisions based upon "personal appearance" to the same degree as those based on race, color, religion, age and sex.

The high water mark for appearance discrimination may have been reached in the lawsuit against Abercrombie & Fitch brought by the Equal Employment Opportunity Commission. Abercrombie & Fitch had sought to promote an "all-American" image and was accused of violating Title VII by maintaining recruiting and hiring practices that favored white males and excluded minorities and women. The EEOC lawsuit and two private class actions were resolved by a Consent Decree that provides for payments of $50 million and significant changes to the way the company recruits and hires employees, makes promotion decisions and assigns jobs.

For decades courts have recognized that companies may adopt a certain image that they want to project to their customers and, to that end, impose dress and appearance standards on their employees without violating federal employment discrimination laws. In this regard, women have been required to wear overalls thought it contradicted their religious scruples against a woman dressing like a man, see *Killebrew v. Local Union 1683*, 651 F. Supp. 95 (W.D. Ky. 1986), men have been required to keep their hair short though no such rule was

imposed on women, *see, e.g., Baker v. California Land Title Co.*, 507 F.2d 895 (9th Cir. 1974), and women were required to wear their hair up contrary to their own fashion sense when necessary to conform to the "Brooks Brothers" image that their employer wanted its employees to project, see *Wislocki-Goin v. Mears*, 831 F.2d 1374 (7th Cir. 1987).

This issue was revisited recently in *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004), *cert. filed*, No. 04-9716 (2005), where Kimberly Cloutier, a cashier at a Costco store in Massachusetts, refused to comply with her employer's dress code prohibiting facial jewelry other than earrings. Costco argued that such jewelry detracted from the "neat, clean and professional image" that the company believed its customers preferred. Cloutier told her supervisors that she would not comply with the policy because she considered constant display of her piercings to be a requirement of her religion, the Church of Body Modification, and her employment was terminated.

The district court had found in favor of Costco, ruling that the employer had reasonably accommodated Cloutier by proposing that she either cover or temporarily replace her piercings while working. The First Circuit, however, went further. It ruled that Costco had no duty to accommodate Cloutier in the first place because the accommodation that she had requested, an exemption from its appearance policy, would impose an undue hardship on Costco. The First Circuit was clearly mindful of long-established precedent that customer preferences (like Abercrombie & Fitch's desire for an "all-American" image) cannot be used as an excuse for employment discrimination: customer hostility, for example, is no defense to refusing to hire Hispanic salesmen.

These two opposing positions the use of appearance in employment decisions may be on a collision course in the forthcoming en banc review of the Ninth Circuit's decision in *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076 (9th Cir. 2004). A divided panel had rejected Jespersen's Title VII disparate treatment claim after she was fired for refusing to comply with a new policy that set specific appearance standards for men and women working in specified positions. This policy required Jespersen, a bartender with nearly 20 years of experience at Harrah's, to comply with a number of sex-specific appearance standards, including wearing make-up to work. Jespersen refused, arguing that wearing make-up made her feel "degraded" and "forced her to be feminine."

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The panel majority found that Harrah's policy was no different than other policies applying gender-specific grooming and appearance standards that the Ninth Circuit had previously ruled do not constitute discrimination on the basis of sex. The court noted that while sex-differentiated appearance standards that impose "unequal burdens" on men and women could be discriminatory, the challenged standards did not meet this test. Jespersen had argued that the "unequal burdens" test should be invalidated in light of the decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which, as interpreted by the Ninth Circuit, had "held that an employer may not force its employees to conform to the sex stereotype associated with their gender as a condition of employment." Although the court previously cited to *Price Waterhouse* in upholding employees' claims of harassment for failing to conform to sex stereotypes, it rejected the implication that "there is any violation of Title VII occasioned by reasonable regulations that require male and female employees to conform to different dress and grooming standards." *Id.* at 1082-83.

The dissent objected strenuously, arguing that Jespersen "articulated a classic case of *Price Waterhouse* discrimination," and reasoning that she was fired for refusing to conform to the sex stereotype that women wear make-up. The dissent concluded that "when an employer takes an adverse employment action against a plaintiff based on the plaintiff's failure to conform to sex stereotypes, the employer has acted because of sex." This broad interpretation of the sex-stereotyping theory of discrimination necessarily means that any appearance standards that impose different requirements on men and women are discriminatory per se.

Perhaps there should be a law affording employees a right to express their self-image through their personal appearance at work. Perhaps, too, workers like Jespersen should not be required to wear make-up just because that it is the image her employer wants its female bartenders to project. Does that mean, however, that Cloutier must be allowed to show her multifarious body

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piercings that is contrary to the "neat and clean" image that Costco has built into its company's marketing strategy? Is correcting such perceived injustices really what Title VII was intended to do?

Our national employment discrimination law is premised on the belief that there simply are no relevant differences between blacks and whites, men and women, Hispanics and Anglos, Christians and Jews with respect to the qualities and characteristics that really matter (or that should matter) for the workplace, except for that small range of instances where, for example, sex (but never race) can be a bona fide occupational qualification.

But appearance is different because appearance matters. How employees dress and groom themselves affect the image that the company is trying to project to the marketplace so as to differentiate itself from its competitors in the eyes of – shall we say? – "discriminating" consumers. And, it seems, attractiveness sells. From the perspective of enlightened rationality, this may all seem to be benighted bias, but it is also, it seems, something embedded in the fabric of the human condition. For this reason, appearance discrimination, unlike almost anything else in employment discrimination law, rises at the intersection of civil rights and social engineering. How far the courts will go with this is still too early to tell. ■

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Save the Date

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Join us for an evening of networking with your fellow chapter members at our

Summer Barbecue

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