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"Here's Looking At You, Kid"

The EEOC Looks For Beauty Bias

By James J. McDonald, Jr. (Irvine)

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 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, 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.

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

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Coming Into Focus

An Overview Of The NLRB's Most Recent Guidance On Social Media And Confidentiality Policies

By Karen Luchka (Columbia)

In the last ten months, the National Labor Relations Board has issued three separate reports on social media. The first two reports, which were released in August 2011 and January 2012, left no doubt that the Board was paying close attention to employers' treatment of social media use by employees and scrutinizing policies that restricted employees' use of social media. The two reports focused primarily on employers' discipline of employees for content posted on social media sites and left many employers feeling like the Board's position on what was acceptable content for social media and related policies was lacking clarity.

The most recent report, the third, was released by the Board's General Counsel on May 30, 2012, and provides for the first time a sample social media policy which the Board deems lawful, as well as several examples of unlawful policies and rules on topics including social media, confidentiality, privacy and contact with the media and government agencies.

The May 30 report will require nearly all employers to review and revise existing policies to make them more narrowly tailored. But it brings into focus the current standards for social media and confidentiality policies and provides employers with a roadmap for revamping their policies.

How To Prevent The Chills – Use Examples

An employer violates the National Labor Relations Act if it maintains a policy or rule that could reasonably tend to chill employees in their exercise of protected rights (these are usually referred to as "Section 7 rights"). For example, a policy which chilled employees' right to discuss terms and conditions of their employment, including wages, hours and working conditions, would be unlawful. According to the Board, "[r]ules that are ambiguous as to their application to Section 7 activity, and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights, are unlawful."

The Board stressed throughout the report that it is important for employers to provide examples in their policies regarding the types of content and activity that the policy lawfully restricts. For example, one policy reviewed in the report instructed employees not to "release confidential guest, team member or company information." The Board found the policy unlawfully overbroad because without examples it could be construed by employees to prevent them from discussing their wages or other conditions of employment. Similarly, a rule which prohibited employees from disseminating "non-public information," without defining that term was found overly broad.

By contrast, the policy deemed lawful by the Board, instructed employees to "[m]aintain the confidentiality of …trade secrets and private or confidential information. Trade secrets may include information regarding the development of systems, processes, products, know-how and technology." The report indicated that because the policy provided specific, lawful examples of the type of information that could not be disclosed by employees the policy was unambiguous and lawful.

"Accuracy" And "Professionalism" Are Overbroad Expectations

Many employer policies encourage employees to exercise good judgment when posting content online. The Board's report underscores that you must be careful when defining what you mean by "exercise good judgment." For example, while it is lawful to require employees to "[m]ake sure you are always honest and accurate when posting information or news, and if you make a mistake, correct it quickly," a policy is unlawful and overbroad if it requires employees' posts to be "completely accurate and not misleading." The Report, issued by the Acting General Counsel, indicated that latter policy "is overbroad because it would reasonably be interpreted to apply to discussions about, or criticisms of, the employer's labor policies and its treatment of employees that would be protected…so long as they are not maliciously false."

Similarly, the report indicated that a policy which prevented employees from posting "[o]ffensive, demeaning, abusive or inappropriate remarks" was overly broad – as was a warning that employees should not "pick fights" online – because employees could interpret both provisions to restrict lawful criticism of employers or their policies.

By contrast, it was lawful for a policy to prohibit statements, photographs or other content "that reasonably could be viewed as malicious, obscene, threatening or intimidating, that disparage customers, members, associates or suppliers, or that might constitute harassment or bullying" and that provided specific, lawful examples of what was considered an offensive post.

Leggo My Logo

The May 30 report reaffirmed that an employer may not blanketly prohibit all employee use of company logos or trademarks. While the Board recognized that employers have a proprietary interest in their trademarks, including logos if trademarked, nevertheless a prohibition of all use by employees was unlawfully overbroad. In particular, employees' non-commercial use of an employer's logo or trademarks while engaging in protected activities does not infringe on the employer's interest, according to the NLRB.

Therefore, just as an employee is allowed to use a company's logo on a picket sign, he or she may use it when engaging in protected activity on social media sites. An employer is permitted, however, to require employees to respect all copyright and other intellectual property laws and show proper respect to both trademarks and other intellectual property owned by others and the employer.

Disclaimers Deemed Lawful

In a deviation from past guidance, the Board report indicated that employers are allowed to prohibit employees from posting anything in the name of their employer or in a manner that could be attributed to the employer. So it's permissible, for example, to require employees to express only their personal opinions, to prohibit representing themselves as speaking for the company, and to advise employees to include a disclaimer that the views they post do not necessarily reflect the views of the employer.

Savings Clauses Don't Save You

Since the release of the Board's first report on social media, many employers have added "savings clauses" to their policies on social media, confidentiality, and employee conduct. Savings clauses are generally at the end of the policy, and state, in some form, that nothing in the policy should be construed to interfere with employees' Section 7 rights. The May 30 report found that such policies are insufficient to cure unlawfully overbroad policies.

The basis for the Board's finding is that employees would not understand from the disclaimer that activities protected by the law are, in fact, permitted, and are not likely to understand the significance of the provisions because they are often written in legalese. For example, most

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employees would not understand what their right to engage in "protected, concerted activity" actually permits and, therefore, the utility of a savings clause with such language is very limited.

Avoiding Social Snafus

In light of this most recent report, it's important to pull out and review your social media policies, even if they have been reviewed recently, to ensure that the policies comply with the guidance and provide sufficient context and examples so as to be unambiguous from the perspective of employees. Additionally, the guidance gleaned from this report is not applicable solely to social media policies, but also to policies on confidentiality, media contact, and employee conduct.

Since the NLRB takes the view that a company policy on almost any subject could be construed as chilling employees' protected rights, it's critical to conduct a careful review of your policies to avoid a social media policy snafu. You don't want to wind up as one of the examples of unlawful policies in future Board guidance!

For a copy of the lawful policy distributed by the Board or if you'd like help in reviewing your policies, please contact your local Fisher & Phillips attorney.

For more information contact the author at KLuchka@laborlawyers.com or 803.255.0000.

Liability Beyond Your Workers' Compensation Coverage

By Dan O'Brien and Nikki Farley (Cleveland)

Pop quiz!

True or False? Workers' compensation is the exclusive remedy for employees pursuing a recovery against their employer. The answer is of course false. The exclusive remedy doctrine provides that when an employee is injured within the course and scope of employment, the employer's liability is limited to benefits payable under the state's workers' compensation statutes; mainly lost wages and medical benefits.

This doctrine was a trade off, giving employers "immunity" from being sued for their actions (or inactions) that resulted in injuries to employees. In return for this immunity, the employee's negligence would not be grounds to deny a workers' compensation claim. Instead, workers' compensation systems adopted the concept of "no fault" coverage.

While the no-fault end of the tradeoff has remained relatively unchanged, legislatures and particularly the courts have continued to chip away at the Exclusive Remedy doctrine. This erosion allows employees to bring suit against employers, outside of the workers' compensation system, under certain defined legal theories. Consequently, it generated uncertainty as to the insurability of suits brought by employees. A standard comprehensive-general-liability policy excludes coverage for any suit brought by an employee.

Dual Coverage Under Standard Workers' Compensation Policies

The insurance industry responded to this gap in coverage by expanding a standard workers' compensation policy beyond the scope of simply providing benefits for statutory workers' compensation issues. Workers' compensation policies now have two parts: Part One, (sometimes referred to as Coverage A) provides workers' compensation coverage; and Part Two,(sometimes referred to as coverage B) provides employer liability coverage.

Part One covers the benefits your company is required to pay under state law. There is normally no limit to this coverage. The insurer will pay all compensation and medical benefits your company is legally obligated to pay under your state's workers' compensation statutes, without limit. Part Two insures your company for the obligation to pay damages because of bodily injury by accident or disease, including death, if the condition arises out of and in the course of employment and if there is a legal-recovery theory available to the employee beyond the workers' compensation statutes.

Part Two, Employer Liability Coverage

At first glance, it may seem unlikely that any injury to an employee occurring while an employee is at work could fall outside the workers' compensation system. But there are a few potential situations in which an on-the-job injury can result in further liability beyond a comp claim. Some states have legal theories that will carve out exceptions to the exclusive-remedy doctrine and each state must be looked at individually. Outlined below are general areas of law in which Part Two coverage issues could arise.

Third-Party-Over Liability

Part Two provides coverage for suits filed by an employee against a third party where there is a contract between the employer and the third party which requires the employer to hold the third party harmless. These situations arise most often in the construction industry when a sub-contractor's employee is injured, files a workers' compensation claim and then sues an upstream contractor for failure to maintain a safe worksite. The upstream contractor then hands the suit off to the subcontractor/employer because the subcontractor/employer has agreed by contract to hold the upstream contractor harmless.

Because the suit is by an employee, the general-liability will not apply. However, Part 2 of the employer's workers' compensation policy almost certainly would provide coverage for the employer. There are other types of actions that would be considered third-party-over liability including potential subrogation actions against the employer by a third party that has been successfully sued by an employee.

Dual Capacity

Part Two coverage can apply in situations where you may be exposed to liability in a suit by an injured employee in a non-employer capacity. This is known as "dual capacity." An example of a dual capacity would be where the employee is injured during the course and scope of employment by a product that is manufactured by your company.

For example, an employee of a forklift manufacturer is using a forklift made by his or her employer to move product around a warehouse. The forklift malfunctions which results in injury to the employee. The employee files a workers' compensation claim and also sues the manufacturer (the employer) under a products-liability theory. Dual Capacity would allow the employee to maintain both the workers' compensation action and a lawsuit for product defect.

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Intentional Tort

Where permitted under state law, employees may have a cause of action beyond a workers' compensation claim when an employee is injured at work and files suit against an employer alleging the intentional acts of the employer resulted in injury to the employee. These types of cases involve a common law cause of action for damages. As a practical matter, these suits may be defended under Part Two coverage because it is a question of fact as to whether or not the injury was caused by the intentional acts of the employer. In many jurisdictions, the concept of what constitutes an intentional act has been expanded beyond a deliberate intent to injure, to injuries that result from the willful indifference of the employer.

No Unified Theories

Many states have variations to the above three theories that allow employees to by-pass the exclusive remedy doctrine, including a number of states that allow a cause of action for "bad faith" when the employee can prove that workers' compensation benefits were inappropriately withheld. An interesting twist to employer's liability is the Texas system where employers are literally allowed to withdraw from the workers' compensation system altogether.

As noted above, not all injuries sustained in the course and scope of employment are exclusively covered by workers' compensation benefits. Employers need to look beyond Part One of their workers' compensation insurance contract and make sure they have broad adequate coverage under Part Two of the contract or under a separate employer's liability policy.

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In Texas, employers may opt out, or "nonsubscribe," from workers' compensation. The tradeoff is that employer immunity vanishes and injured employees may sue for negligence. Despite this exposure, responsible nonsubscribers have realized substantial cost savings by implementing solid workplace safety programs and offering benefits plans superior to the comp system.

To discuss this possibility for your business, or for more information, contact Joe Gagnon in our Houston office at 713.292.0150.

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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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