

Help for the Homely as EEOC Explores Discrimination Based on Looks

July 2012

Just when you thought the list of traits that can form the basis for a charge of discrimination couldn't possibly grow any further, the EEOC is considering whether claims based on "looks" violates Title VII or the ADA. According to a recent article by James McDonald of Fisher & Phillips, LLP, ("Here's Looking at You Kid-The EEOC Looks for Beauty Bias"), quoted here at length, 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."

While it is currently unlawful for an employer to hire only young persons, or applicants of a particular gender, unless it is a bona fide occupational qualification, it is not illegal to favor good-looking employees. Only a handful of jurisdictions presently have laws prohibiting employment discrimination based on appearance. The District of Columbia's anti-discrimination law 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.

The closest federal law comes to dealing with appearance discrimination is the ADA's definition of "impairment," which includes cosmetic disfigurements, but 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. Merely being overweight or homely, however, will not likely trigger ADA coverage.

The EEOC's efforts raise troubling issues. What standard will be used to divide the attractive from the unattractive? The old saying that "beauty is in the eye of the beholder" makes it difficult to draw such lines. Also, could an aversion to such suits force employers to discriminate against good looking employees, and would such practices result in "reverse discrimination" claims?

While there is little organized outcry today from those claiming they were discriminated against based on their looks, it's possible the concept could gain traction through enforcement or legislative efforts. It was not that long ago that many of the rights and protections employees enjoy today were far-fetched concepts without any legal standing. Time will tell whether unattractiveness is added to the long list of characteristics worthy of legal protection.

For more information or assistance, contact scott@schaffer-law.com or 860-216-1965.

www.schaffer-law.com