Appearance Discrimination: A Changing LANDSCAPE

By JAMES B. TAYLOR

Put simply, "appearance discrimination" means discrimination based on an individual's physical appearance. While a novel concept, this issue is becoming increasingly relevant in modern employment. There has undoubtedly been a growing trend toward the acceptance of formerly-taboo physical expression. Further, there has been a steadily-growing social acceptance of body diversity. For example, up to 30% of college graduates in the United States have tattoos. Likewise, up to 160 million Americans are considered "obese or overweight," a group including nearly a third of American adult men and women. Of course, there are dozens of other physical characteristics, whether voluntary or not on the part of the individual, that distinguish individuals' physical appearance, and which may place them outside of traditional business "norms" with respect to employee appearance. The question therefore persists: does an actionable claim exist for "appearance discrimination"?

Appearance Discrimination Under Federal Law

On the federal level, while there are numerous prohibited forms of discrimination in employment under various laws, there is no direct federal prohibition on "appearance discrimination" in employment, standing alone. However, the concept of "appearance discrimination" has been steadily gaining steam in the employment context over the past decade, with the EEOC indicating that a record number of "appearance discrimination"-related cases have been asserted against employers since 2010. Given the lack of a specific federal "appearance discrimination" law, claims involving such issues are typically couched in the context of prohibited race, sex, or disability discrimination. Over the past several decades, such cases decided under federal law generally appear to be moving toward a growing acceptance of "appearance discrimination"-type cases, specifically where the "appearance discrimination" can be tied to the employee's status as a member of a protected class.

Federal "Long-Hair" Caselaw of the 1970s

Beginning in the 1970s, federal caselaw established the legal baseline for "appearance discrimination"-type claims. After the enactment of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq.,* courts saw a subsequent onslaught of cases brought in opposition to employers' grooming and dress policies. In these cases, the "appearance discrimination" aspects of such claims generally asserted that the appearance standard, dress code and/or grooming policy at issue has a prohibited discriminatory effect and/or is discriminatorily enforced with respect to the employee's protected status (whether that be race, national origin, sex, age, disability, etc.)

Many of the initial federal "appearance discrimination"-type of claims were asserted by male employees who wore long hair in violation of their employers' grooming standards. Other notable cases involved claims asserted by female flight attendants who violated their employers' body weight requirements. As expected, the long-haired male employees primarily relied on Title VII's protection against sex discrimination, arguing that, if an employer allows women to maintain long hair in the workplace, banning men from having long hair constitutes disparate treatment based on sex and is therefore unlawful under Title VII. Among these "long hair" cases, the most-cited decision came in the case of *Willingham v. Macon Tel. Pub. Co.,* 507 F.2d 1084 (5th Cir. 1975). There, the plaintiff sued an employer based on the employer's refusal to hire him because he wore shoulder-length hair. *Id.* at 1087. Importantly, the plaintiff's claim in this case was expressly presented as a "sex-plus" claim – i.e. claims that involve the classification of employees by sex in addition to one other characteristic. *Id.* at 1088-89.

In *Willingham,* the employer's dress code required employees who came in contact with the public to be neatly dressed and groomed in accordance with the standards customarily accepted by the business community. *Id.* at 1087. After a review of the arguments, the *Willingham* court determined that the employer's discrimination against the plaintiff was solely based upon its grooming standards policy, and not the plaintiff's sex. Therefore, Title VII was not violated by the employer's actions. *Id.* at 1088. In rejecting the plaintiff's "sex-plus" discrimination argument, the court determined that the existence of a general sex stereotype may not necessarily constitute the "plus" aspect of a "sex-plus" claim. *Id.* at 1092. Instead, the court found that the "plus" must constitute an "immutable characteristic" of the employee – a characteristic that does not include how an individual wore his or her hair. *Id.* To the *Willingham* court, "distinctions in employment practices between men and women on the basis of something other than immutable or protected characteristics do not inhibit employment opportunity(ies)" in violation of federal law, as the law "sought only to give all persons equal access to the job market, not to limit an employer's right to exercise his informed judgment as to how best to run his shop."

New Federal Precedent Set by Flight Attendant Caselaw

As the 1970s progressed, the majority of federal courts followed the *Willingham* rationale and typically refused to find Title VII violations based on an employer's grooming and appearance policies, even where those policies may have had differing requirements based on an employee's sex. As referenced above, another wave of cases involving "appearance discrimination"-type claims came in the form of several suits challenging employers' appearance requirements for female flight attendants, requirements which often focused on the flight attendant's weight. An important decision amongst these cases was the decision of *Gerdom v. Continental Airlines, Inc.,* 692 F.2d 602 (9th Cir. 1981), *rev'd on merits upon reconsideration en banc,* 648 F.2d 1223 (9th Cir. 1981), *cert. denied,* 460 U.S. 1074 (1983).

In the *Gerdom* case, an airline employer was sued by a female flight attendant based on the employer's appearance standards. The flight attendant in this case was terminated for exceeding her employer's maximum weight specifications relative to her height. *Id.* at 603. Under these standards, a flight attendant who was 5'2" could weigh no more than 114 pounds. *Id.* at 604. The airline employer's stated purpose for its weight program was "to create the public image of an airline which offered passengers service by thin, attractive women," whom airline executives referred to as the employer's "girls." *Id.* At the same time, the employer maintained a category of male employees, whose duties overlapped with those of the flight attendants (known as "directors of passenger service"), yet who were not subject to any form of weight restrictions. *Id.* Based on these facts, the *Gerdom* court ultimately broke

from the trend of cases following Willingham, and ruled in favor of the flight attendants. *Id.* at 610. In reaching this conclusion the *Gerdom* court found that the airline's weight program for female flight attendants was facially discriminatory as it only applied to women. *Id.* at 608. Notably, the *Gerdom* court distinguished this case from others where a grooming policy had different rules for male and female employees but was applied evenhandedly and did not deprive either sex of employment opportunities. *See Barker v. Taft Broadcasting Co.,* 549 F.2d 400 (6th Cir. 1977).

Since the time of *Gerdom,* cases decided under federal law have generally taken an increasingly expansive view of "appearance discrimination"-type claims, particularly where the facts involved show disparate treatment by an employer based on an employee's federally-protected status. This can be seen in recent EEOC guidance, where it has taken the position that obesity, particularly when combined with other health conditions, should be viewed as a disability subject to the ADA's protections against discrimination.

The Emergence of State and Local Laws Prohibiting "Appearance Discrimination"

A growing list of states, counties and municipalities have enacted protections that go beyond the federal laws regarding employment discrimination. Washington, D.C., for example, has enacted laws prohibiting all personal appearance discrimination. *See e.g. Ivey v. District of Columbia,* 949 A.2d 607, 615 (D.C. 2008) (distinguishing claim by overweight employee under federal law versus state law, which authorized appearance discrimination claims). Cities, such as Binghamton, New York; Santa Cruz, California; and San Francisco, California have also enacted ordinances which prohibit discrimination based on weight and height. Madison, Wisconsin and Urbana, Illinois have passed laws banning discrimination in employment based on a person's "physical appearance" and "personal appearance," respectively.

An example of the operation of these new laws can be seen in Madison, Wisconsin. In general, Madison's law, like many other local laws on this topic, operate much like federal discrimination laws in the sense that they may allow an employer to base employment decisions on physical experience where such is required by a legitimate business need or necessity. *See* City of Madison, Code of Ordinances Ch. 39; *see also Sam's Club, Inc. v. Madison Equal Opportunity Comm'n,* 2003 WI App. 188 (Wis. Ct. App. 2003) (enforcing employer's policy against facial jewelry in "appearance discrimination" claim under City of Madison ordinance where the employer showed it had a legitimate business reason for its policy).

Given this new and changing landscape, employers should review their personal appearance standards with an eye toward how these standards could be viewed under federal law. In addition, employers should also review applicable state or local law regarding these issues, as several states and cities now provide employees with additional protection from "appearance discrimination" in employment.

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