



# Welcome to: Beauty and Appearance in the Work Place

The Webinar will begin shortly. Thank You!



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# Introduction and Overview

“Ugly Betty” TV show: “pretty people earn more; are more persuasive sales people”



# Introduction and Overview

News item: Mexican drug cartels are recruiting “pretty, good-looking” 18-30 year-old women to wipe out their enemies. Pretty women, they believe, surprise the intended male victims, who let their guard down and are thus a lot easier to whack.



# Statutory Framework

With just limited exceptions, looks-based discrimination favoring attractive and image-enhancing employees, while shunning the unattractive, remains very much alive and largely beyond the scope of existing national antidiscrimination laws.



# Statutory Framework

Generally, there is no protection for “mutable characteristics” such as height, weight, facial characteristics or “unattractiveness”



# Statutory Framework

There must be “something more” than mere appearance to invoke the protections of federal antidiscrimination law, for example:

a. Title VII

- i. Religion
- ii. Disparate treatment on the basis of sex
- iii. Disparate treatment or exclusion on the basis of race or national origin



# Statutory Framework

## b. ADA

- i. Physiologically-based morbid obesity
- ii. Transgender discrimination
- iii. Disfigurement

## c. ADEA



# Statutory Framework

Local exceptions: only a few cities have enacted legislation barring discrimination on the basis of physical appearance, including manner and style of dress and personal grooming.

- a. Washington, D.C. [D.C. Code Ann. §2-140.11 (2001)]
- b. Santa Cruz, California [Santa Cruz Municipal Code 9.83]



# Statutory Framework

- c. Madison, Wisconsin, prohibits discrimination on the basis of “physical appearance,” defined as both immutable characteristics (*e.g.*, height, weight and facial features) and mutable characteristics (*e.g.*, hairstyle beards and manner of dress), but exempts employer requirement uniformly applied “in a business establishment for a reasonable business purpose.”  
Madison Genl. Ordinance §39.03(2)(bb)
- d. Michigan prohibits discrimination on the basis of height and weight only. Mich. Comp. Laws §37.2202(1)(a).



## Statutory Framework

- e. New York State and City disability discrimination laws, for example, are broader in scope than the ADA. Examples:
  - i. *State Division of Human Rights v. Xerox Corp.*, 65 N.Y.2d 213 (N.Y. 1985)(rejected applicant's "gross obesity" is a protected "disease" under New York State Human Rights Law, though not an ADA impairment)
  - ii. *Hazeldine v. Beverage Media, Ltd.*, 954 F.Supp. 697 (S.D.N.Y. 1997) (obese employee fired; ADA claim dismissed as "obesity" is not an ADA disability; summary judgment denied on state and City human rights laws claims)



## Case Law

1. *Gonzalez v. Abercrombie & Fitch Stores, Inc.*, No. 03-2817 SI (N.D.Cal. 2004) (Class action settled for \$50 million; plaintiffs alleged that A & F's "Look Policy," its conception of "natural, classic American style," epitomized by a "good-looking," "pretty," "handsome" and "preppy" sales force, unlawfully excluded African-Americans and Hispanics from selling positions).



## Case Law

2. *Yanowitz v. L'Oreal USA Inc.*, 36 Cal. 4th 1028 (2005) (General manager of a perfume company, visiting a department store selling his company's fragrances, instructed his regional sales manager to fire a dark-skinned sales associate because he thought she wasn't attractive enough. He preferred "fair-skinned blondes" and told the manager "get me somebody hot." On a return visit, fuming because the sales associate hadn't been fired, he pointed to a "young, attractive blonde girl, very sexy" and barked at his regional manager, "damn it, get me one that looks like that." He terminated the regional manager, who, in turn, successfully sued for retaliation under California's fair employment law).



## Case Law

3. *Rex v. Hotels AB LLC*, Index No. 650186/2011 (Sup. Ct. N.Y. Co.) (A recently filed New York City case; two extremely attractive, but short cocktail waitresses were fired when their employer, the “Boom Boom Room,” decided to go with tall, willowy, beautiful runway type women to deal drinks. The all-male bartender crew was not affected).



# Specific Workplace Issues

## Overweight, Fat and Morbidly Obese

A person's obesity can severely diminish his or her employment opportunities

“[i]n a society that all too often confuses ‘slim’ with ‘beautiful’ or ‘good.’”



# Specific Workplace Issues

## Overweight, Fat and Morbidly Obese

According to a University of Florida study, women weighing 25 pounds less than the group norm earned an average \$15,572 a year more than heavier women. The study found, however, that men who weighed 25 or more pounds *less* than average were penalized, earning almost \$8,500 less than their beefier colleagues. That trend tapered off when their weight hit the obese level.

<http://jobs.aol.com/articles/2010/11/29/weight-job-search/?ncid=webmail>



# Specific Workplace Issues

## Overweight, Fat and Morbidly Obese

Merely being overweight enjoys no statutory protection.

ADA regulations exclude from definition of impairments “physical characteristics such as ...weight, or muscle tone within ‘normal’ ranges and are not the result of a physiological disorder.” 29 C.F.R. §1630.2(h) (app.) (2010)



# Flight Attendant Weight Standards

*Frank v. United Airlines*



# Overweight, Fat and Morbidly Obese

## Illustrative cases:

*Cook v. State of Rhode Island, Dept. of Mental Health, Retardation, and Hospitals*, 10 F.3d 17, 28 (1st Cir. 1993) (5'2", 320-pound applicant for a job as an attendant at a residential facility for retarded persons passed her pre-hire physical and had no limitations on her ability to do the job; employer violated ADA because the employer rejected plaintiff based on its *belief*, without any evidence, that her morbid obesity compromised her ability to evacuate patients in an emergency and put her at risk of developing weight-related ailments). Nevertheless, the court stated that:

[I]t is well established that an employer is permitted to make hiring decisions based on certain physical characteristics. The mere fact that...[the company] was aware of...[the applicant's] weight and rejected his application for fear that his appearance did not accord with the company image is not improper. *To hold otherwise would render an employer's ability to hire based on certain physical characteristics entirely void.*



# Overweight, Fat and Morbidly Obese

## Illustrative cases:

*Goodman v. L.A. Weight Loss Centers, Inc.*, 2005  
U.S. Dist. LEXIS 1455 at \*7 (E.D. Pa. 2005). Company  
marketing weight reduction plans successfully refused to  
hire a 350-pound individual as a sales counselor on the  
ground that it viewed his physical appearance as being  
"manifestly inconsistent with the product it was trying to  
sell."



## Overweight, Fat and Morbidly Obese Illustrative cases:

*Hein v. All Am. Plywood Co.*, 232 F.3d 482 (6th Cir. 2000)  
(overweight employee's age and disability charges dismissed despite evidence that supervisor circulated cartoon depicting him as "Big Boy" and coworkers called him various weight-related nicknames, including "Buffet Boy;" court held plaintiff failed to connect supervisor's "alleged prejudice against heavier individuals" with his termination).



# Overweight, Fat and Morbidly Obese

## Illustrative cases:

*Marks v. National Communications Assoc. Inc.*, 72 F.Supp.2d 322 (S.D.N.Y. 1999) (high performing 270-pound female telemarketer repeatedly turned down for promotion, but told by management that she would get a *promotion if she lost weight*; heard that a “thin and cute” woman selected for the job she thought she deserved; her performance declined sharply and she was terminated; sued, claiming that the employer unlawfully applied more stringent weight and attractiveness standards to women than men; case summarily dismissed; she failed to adduce comparative evidence to support her claim).



## **EMPLOYERS RARELY ACCOMMODATE DRESS AND APPEARANCE “ANOMALIES”**

- Generally, employers do not approve of visible tattoos, facial piercings or earrings and ear studs on male employees
- The belief is that these manifestations of individual preference detract from the employer’s carefully cultivated “image” or appropriate professional appearance
- No laws explicitly protect tattoos, facial piercings or the wearing of male ear jewelry
- As a result, discharged employees have challenged their employers – with decidedly mixed results – on religious, national origin and gender



# ILLUSTRATIVE CASES

## ■ Accommodating religion challenges

Church of the American Knights of the Klu Klux Klan visible tattoo case

*Swartzendruber v. Gunita Corp.*, 99 F.Supp2d 976 (N.D. Ind. 2000)

Church of Body Modification eyebrow piercing case

*Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1<sup>st</sup> Cir. 2004)

Worship of Egyptian Sun God Ra tattoo case

*EEOC v. Red Robin Gourmet Burgers*, 2005 WL 209067 (W.D. Wash. 2005)



## ■The Challenge of Islam

In the private sector female employees for whom wearing the *hijab* is an evocation of religious faith and public modesty have generally been successful in challenging their employers on failure to accommodate their religious beliefs

The EEOC rejects employers' "customer preference" (especially post-9/11) defense.

*EEOC v. Alamo Rent-A-Car LLC*, 432 F. Supp.2d 1006 (D. Ariz. 2006)

*EEOC v. American Airlines, Inc.* 02C-6172 (N.D. Ill. 2002)

The EEOC is also challenging employers who essentially argue that their marketing image or "look" is compromised by employees wearing *hijabs*

*EEOC v. Abercrombie and Fitch Stores, Inc.*, No. 5:10-CV-03911 (N.D. Cal. 2010)

*EEOC v. Abercrombie and Fitch Stores, Inc.*, No. 4:09-CV-00602 (D. Okla. 2009)

The case of the *hijab* vs. Disney's 1890's theme restaurant



## ■ Gender Challenges

Her visible broken heart tattoo vs. his visible US Navy anchor tattoo case

*Hub Folding Box Company, Inc. v. Massachusetts Commission Against Discrimination* 2001 WL 789248 (Mass.App.Ct. 2001)

## ■ Men with Earrings and Studs: Gender-Based Challenges to Grooming Policies

Courts uniformly uphold employer dress codes that permit women to wear earrings, but prohibit men from doing so

“Minor sex-based distinction in dress and grooming codes”

*Capaldo v. Pan American Federal Credit Union*, 1987 WL 9687 (W.D.N.Y. 1987)

Antidiscrimination laws “were not meant to prohibit employers from instituting personal grooming codes that have a de *minimis* effect on employment

*Pecenka v. Fareway Stores, Inc.*, 672 N.W.2d 800 (Sup.Ct. Iowa 2003)



## ■ Other Challenges

Hostile work environment, sexual harassment: “sexy clothes”

*Schmitz v. ING Securities*, 191 F.3d 456 (7<sup>th</sup> Cir. 1999)

Refusing to wear makeup

*Jespersion v. Harrah's*, 444 F.3d 1104 (9<sup>th</sup> Cir. 2006)

Challenges to the BFOQ (“Bona Fide Occupational Requirement”) defense

*Wilson v. Southwest Air Lines*, 880 F.2d 807 (5<sup>th</sup> Cir. 1989) (female sex appeal is not a legitimate BFOQ)

What about Hooters?



# DEFORMITIES AND DISFIGUREMENT MAY BE OR MAY NOT BE PROTECTED

■The general rule: Unless a deformity or disfigurement is an impairment so severe that it limits (or is perceived by the employer to limit) the employee in a major life activity, *it is not protected* by the ADA

## ■Severe burns

*EEOC v. Extra Space Management, Inc.*, Civ. Action No. 8:08-cv-02498 (D. Md. 2009)

## ■Employee missing all his front teeth

*Talanda v. KFC National Management Co.*, 140 F.3d 1090 (7<sup>th</sup> Cir. 1998)

*Hodgdon v. Mt. Mansfield Co.*, 624 A.2d 1122 (Vt. 1992)



# **PRACTICAL GUIDANCE FOR AVOIDING LAWSUITS**

- **Granted, it's *not* unlawful to prefer tall, thin, physically attractive employees enhancing your company's image, selling your product or working in your office**
  
- **What *is* unlawful, however, is excluding, terminating or refusing to promote people who fail to measure up to your preferences – or the presumed preferences of your customers -- because of:**
  - Protected disabilities
  - Religious beliefs requiring certain headgear, dress or the wearing of beards
  - Immutable characteristics such as race, color or national origin



# OK, WHAT ARE THE STEPS TO TAKE TO AVOID LITIGATION?

- **Go through your grooming policies and employee handbook to:**

- Delete disparate gender-based distinctions that cannot be justified on safety or other lawful grounds

- Delete rules that do not accommodate religious practices (such as *hijabs* or other head coverings)

- **Don't rely on your customers' "preferences" to exclude anyone**

- **Think twice – and then think again -- whether your BFOQ discriminates in terms or application on the basis of gender and whether it even makes sense**

- **Start developing strategies to accommodate your applicants' and employees' religious preferences and covered disabilities**

- **Train your hiring personnel and managers to avoid the pitfalls**



Questions?



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