



**Lawsuit on Employer's "Pretty Employee" Requirement Produces Ugly Result for Employers: Federal Court Rules that Discrimination Based on Appearance is Actionable**

*By Attorney Bryan T. Symes*

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Late last month, in the case of *Lewis v. Heartland Inns of America, L.L.C.*, the U.S. Court of Appeals for the Eighth Circuit (the federal appellate court that presides over Minnesota and several other Midwestern states) concluded that adverse employment decisions (e.g., demotion, failure to promote, or termination of employment) based on employees' nonconformity with sexual stereotypes violate federal anti-discrimination law.

This unattractive decision forces certain employers doing business in Minnesota to reevaluate organizational policies and practices concerning hiring, firing and other personnel decisions, including but not limited to pre-employment recruiting practices, job descriptions, and grooming and dress standards. Under this newly heightened scrutiny, many employers must now be prepared to appropriately justify policies or practices that require female or male attractiveness.

**Claims**

In *Lewis v. Heartland Inns of America, L.L.C.*, the plaintiff, Brenna Lewis, sued her former employer, Heartland Inns of America, L.L.C. (and several individual defendants), alleging sex discrimination and retaliation under Title VII and state law. Lewis's claims were based on Heartland's allegedly unlawful gender-based stereotyping, arising out of Heartland's termination of her employment as an "A-shift" front desk clerk, because Lewis's appearance failed to conform to the "pretty," "Midwestern girl look," that Heartland allegedly valued.

**Facts**

Lewis was, for the first year and a half of her employment preceding the litigation, a good performer for Heartland, earning two merit-based pay raises and customer praise in her role as night auditor/desk clerk at Heartland's Waterloo, Iowa location. Lewis eventually assumed a part-time role as hotel desk clerk at two Heartland locations near Des Moines, Iowa. Lewis was valued by her direct supervisors at both locations, and was offered a full-time desk clerk position, which Lewis accepted (without having to interview for the position).



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Later, Heartland's Director of Operations, Barbara Cullinan, upon seeing Lewis for the first time, informed Lewis's direct supervisor that Lewis might not be a "good fit" for the front desk position. Cullinan commented repeatedly about Lewis's appearance, informing Lewis's direct supervisor that Heartland "took two steps back" when it replaced Lewis's predecessor with Lewis. Apparently, according to Cullinan, Lewis lacked the "Midwestern girl look" (Lewis described her appearance as "slightly more masculine," and others referred to her as "tomboyish"). Cullinan also indicated that Heartland staff should be "pretty," and that Lewis's appearance "was not what she wanted on the front desk."

Cullinan ordered Lewis's direct supervisor to return Lewis back to the overnight shift, but Lewis's supervisor refused. The following week, Cullinan insisted that Lewis's direct supervisor resign. Later, Cullinan met with Lewis, and required her to interview for the front desk position, claiming that the interview was required because she lacked the "Midwestern girl look." Lewis protested, but participated in the interview. Three days after her interview, Heartland fired Lewis (ostensibly in response to allegedly hostile comments Lewis made about Heartland's policies in her interview with Cullinan).

### **Decision**

The Eighth Circuit concluded that gender-based stereotyping can violate Title VII when such stereotyping influences employment decisions and occurs because of the victim's sex, and allowed Lewis to proceed with her claim. The Eighth Circuit also suggested that, under certain circumstances, if an employer is able to sufficiently demonstrate that female or male attractiveness is a so-called bona fide occupational qualification ("BFOQ") – that is, where attractiveness is necessary to performance of the duties or the normal operation of the business – appearance-based policies or practices may withstand scrutiny. Establishing such BFOQs in other areas is notoriously difficult, however.

In light of this recent decision, Minnesota employers are encouraged to promptly take steps to evaluate and, if necessary, modify personnel-related policies and practices that may suggest that employment decisions are based on attractiveness or conformity with

sexual stereotypes (e.g., women should wear dresses or makeup, men should work "in the plant/field" and women "in the office"), or be prepared to defend "attractiveness" or gender as a BFOQ for the particular business or position at issue. Call the author or any Seaton, Beck & Peters lawyer at (952) 896-1700 if you would like to discuss this case or review your job descriptions, hiring criteria and hiring policies.

### **Seventh Circuit Provides Reminder to Employers: Hostile Work Environment Harassment Claims More Than Meet the Eye**

By Attorney Bryan T. Symes

This month, the U.S. Court of Appeals for the Seventh Circuit (which presides over Wisconsin, Illinois and Indiana) reminded employers that so-called "hostile work environment" sexual harassment claims are often more than meets the untrained eye.

In *Turner v. Saloon, Ltd.*, the Seventh Circuit held that an employee's hostile environment sexual harassment claim, which was based on at least five specific instances of overt sexual harassment spanning more than eighteen months (including physical touching), necessitated consideration of historic acts that occurred outside of the legal statute of limitations period.

Accordingly, past alleged acts of sexual harassment, which form part of the "entire scope of [the] hostile work environment claim...is permissible for the purposes of assessing liability, so long as an act contributing to that hostile environment takes place within the statutory time period."

This case provides another good – but ultimately avoidable – lesson on the importance of appropriate workplace sexual harassment and retaliation policies and prompt preventative and corrective action in response to claims of sexual harassment.

## **REGISTER NOW**

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Thursday, March 11, 2010

8:15 a.m. — 4:30 p.m.

See attached registration information; for more information go to [www.seatonlaw.com](http://www.seatonlaw.com)