



Who Will Play The Lead In Your Company's Next Performance? The Beauty Or The Beast?

By Sarah M. Yoho (Chicago)

Let's say you are a restaurant manager responsible for interviewing candidates for a maitre d' position. You narrow the applicant pool down to two candidates. Both applicants have similar employment histories, education, and job experiences. But during the interview process, you discover something that sets applicant two apart from applicant one. Here's how the interviews play out:

Act One: The Interviews

Scene One: The Beast

Applicant one enters the room. Your eyes immediately glance up and down as you evaluate applicant one's apparel and appearance. The image you see is registered to your brain, which immediately causes you to think, "Whoa, did you get beaten with the ugly stick?"

You review applicant one's resume and scour through each line searching for reasons applicant one is not the right person to fill the position. Finally, you find one good reason in applicant one's job history. He was employed for merely three months at one job before quitting and moving on to the next job.

You ask a few general questions about applicant one's prior employment and job experience, and inform him that you will be in touch. After applicant one leaves, you quickly toss the resume into the "rejected" pile.

Scene Two: The Beauty.

Applicant two enters the room. As before you glance up and down at applicant two, evaluating her apparel and appearance. The image you see is registered to your brain, which immediately causes you to think, "Wow, applicant two is gorgeous."

Your palms start to sweat. You are captivated by the beautiful vision. Then, you suddenly recall that you are supposed to be interviewing applicant two for a position, not staring at her perfect bone structure. You quickly glance down at applicant two's resume and review her impressive employment history and education.

You notice that applicant two was employed for three months at one job before quitting and moving on to the next job, but you assume it was because she received a better employment offer at the next job. After you finally manage to ask a few questions about applicant two's job experience, you eagerly offer her the position on the spot.

You have finally chosen "the right person" for your company: the beauty.

Act Two: The Legal Dilemma.

You may be asking yourself, "Did I do anything wrong by hiring applicant two based on her good looks?" Well, if your company is doing business in one of the very few locales, such as Washington D.C., that forbid discrimination based on personal appearance, then you may have an issue. And the California Supreme Court recently ruled that hiring decisions based on appearance may mask sex discrimination. *Yanowitz v. L'Oreal USA, Inc.*

But in most jurisdictions, at least technically speaking, your company may be out of the dog house so long as the decision to hire applicant two over applicant one is not based on either applicant's race, sex, age, national origin, disability, or other protected status.

Hiring an attractive person over a person who is less attractive may be

considered by some to be "unfair," but fairness is not a legal factor in determining whether an employment decision is discriminatory in violation of Title VII or similar state and local laws. Under federal, and most state and local discrimination laws, a company can refuse to hire someone for any reason, good or bad, as long as it is not based on race, sex, age, national origin, disability, or any other protected status.

Thus, under those laws, it is not illegal to consider attractiveness when making an employment decision, although, a discrimination claim may

arise if an applicant's attractiveness is correlated to a protected status, such as an applicant's sex or national origin.

Act Three: Applicant One Rears His Ugly Head

Applicant one is upset when he learns you hired Applicant two and files a notice of sex (gender) discrimination with the EEOC. You quickly review the notice to find the name of the complainant. The narrative section of the charge states that your company discriminated against him by refusing to hire him because of his sex, male. You immediately stop, put down the paper, and say to yourself, "What? I didn't think about applicant one's sex at all when I interviewed him."

Maybe not. But if you're not careful, you'll eventually be explaining your reasoning to a jury.

Epilogue

Plaintiffs in discrimination cases frequently do not sue based upon objective factors. In the scenario depicted above, the fact is that your company chose not to hire applicant one because he is less attractive than applicant two, not because he is a male. Now, as a result of his claim, your company will be in the unenviable position of having to respond to the



Continued on page 2

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Continued from page 1

charge by arguing that he was not chosen because, at least to you, he is not good looking.

Despite your company's relentless efforts to persuade applicant one that "unattractive" is not a protected status under Title VII, he will likely argue that your reason for not hiring him is just a pretext for refusing to hire him because he is a male. Or, even worse, he may claim that your company's preference in hiring attractive people over less attractive people has a disparate impact on males.

In either situation, your restaurant may be able to defend against the claim based upon a "bona fide occupational qualification" (BFOQ). To prove the BFOQ defense, an employer must establish that the characteristic relied upon, attractiveness in this case, is directly related to the ability to perform the job duties at issue, and that the job qualification relates to the essence of your restaurant's business.

Courts interpret the BFOQ defense narrowly, but even the California Supreme Court, in the *Yanowitz* case, suggested that if appearance had been a legitimate job qualification, the result might have been different. Courts have made some limited exceptions regarding hiring for specific positions, but appearance all too often is found to be a subterfuge for race, sex or national origin discrimination. You should always consult with your employment counsel before relying on this defense.

The Critic's Review

Let's face it – sometimes looks matter when deciding who is going to represent your company. For example, your company may have determined through a marketing analysis that your customers will buy more of your product if your sales people are attractive. Or, your company may be in the business of selling beauty products and would like to hire

attractive people with exceptionally healthy skin to portray an image to your customers that your product actually works.

Maybe your company has completed a study which concluded that a consumer will be more likely purchase your company's beauty product that is supposed to help consumers maintain a clear complexion if the person selling the product has a clear complexion. In our hypothetical, hiring for a cocktail server position might be an easier case to defend than hiring for a maitre d'.

If your restaurant or bar has a business justification for hiring based on attractiveness, and it is essential to the operation to hire only such people to fill certain positions, consider being up front and open about your company's preference. After all, in most jurisdictions (but there are exceptions!) it is perfectly legal to refuse to hire someone based on personal appearances. Just remember, no one sex, race or ethnic group has a right to be considered more "attractive" than another.

Whatever the reason your company has for preferring to hire attractive people over less attractive people, document the business justification for the preference. Perhaps even consider conducting a marketing survey or study to back up your company's justification.

Looks may matter to your company due to many business reasons. In order to defend your decision in a potential discrimination claim, always try to consider other non-discriminatory factors, such as educational background, history of employment, and job experience when interviewing a candidate for hire. But if the attractiveness of employees is essential to your business operations, consider being up front about your company's preference and be sure to document the business justifications in case you need to pull out the BFOQ sword to defend your company.

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Implications In Applebee's Case Still Worrying The Industry

By Michael S. Mitchell (New Orleans)

In our October/November issue, we reported on a troubling interim decision by a federal district court judge in Missouri. The case involved pay for bartender Gerald Fast, and focused on two issues: whether the restaurant's automated timekeeping resulted in off-the-clock work (referred to as "Appletime"); and whether the restaurant unlawfully applied the federal tip credit to non-tipped work the bartender was required to do, in addition to his other duties.

The judge in the case denied summary judgment and the case is currently proceeding. The off-the-clock claim has been abandoned, but the more troublesome aspect, which we referred to as the core of the case, remains alive. The key to the decision, and the part that should have industry professionals wary, is the court's view that the restaurant must account for non-tipped work... virtually on a minute-by-minute basis.

The case was scheduled for a mediation conference in February, so it is difficult to predict what the eventual outcome will be. But a bad decision here, especially if it is then followed by other courts, could mean big trouble for the industry.

Peeling Away the Claims

Applebee's paid Fast using a "tip credit." As most restaurateurs are well aware, under that system, even though an employee must receive at least the federal minimum wage of \$5.85 per hour, for an employee who routinely receives more than \$30 in tips each month, the employer can credit the tips toward part of that hourly rate. Under a properly-established tip-credit system, the employer is only required to pay a fraction of the minimum wage, i.e., \$2.13 per hour, as long as the employee's wages and tips together equal at least the federal minimum wage. (The minimum wage is scheduled to increase by 70 cents this July, but this "sub-minimum" will remain at \$2.13, making the tip credit even more important than it now is).

Like many employees in the hospitality industry, Applebee's required bartenders like Fast to perform some duties that did not present the opportunity to earn customer tips. These included things such as cleaning, restocking and taking inventory, washing fruit and filling baskets, restocking juices, emptying garbage cans, and wiping down the bar and bar chairs.

The Labor Department has drawn the line for which employers can still take a tip credit for non-tip work at 20%. In other words, under DOL

Continued on page 4

9th Circuit Upholds Casino's Right To Express Opinions On Unionization

By Brian Herman (Atlanta)

The rule of thumb for employers facing union campaigns dictates that managers may offer employees facts about unions, their opinions on unions in general, or their personal experiences in previous dealings with unions.

The general limitation on this rule is that employers may not threaten employees, interrogate or spy on them, or promise benefits in exchange for opposing the union.

In a recent case, the Culinary Workers and Bartenders Unions sought to limit an employer's right to express opinions regarding unionization. On appeal, the U.S. Court of Appeals for the Ninth Circuit rebuffed the unions' attempts and maintained employers' rights to freely communicate with their employees about unions. *Joint Executive Board of Las Vegas v. NLRB*.

The Campaign

In May 2003, the Culinary Workers and Bartenders Unions openly sought to organize housekeeping and food/beverage employees at the Aladdin Resort and Casino in Las Vegas. During the campaign, employee union committee leaders would approach other employees in the Employee Dining Room to convince them to sign union authorization cards. The Employee Dining Room at the Aladdin was a 24-hour facility open to all employees of the resort, including managers.

On two occasions, managers observed organizers soliciting signatures from other employees in the Employee Dining Room. In the first situation, after briefly observing the conversation between the organizers and the employees, a manager came to the table where they were sitting, interrupted their conversation, and stated that she "wanted to make sure" the employees had "all the facts" before signing a card. The manager informed them that their signatures were "legal and binding," that the card authorized union dues to come out of their paychecks, and that bringing in the Unions would not guarantee better medical insurance.

After this interaction, which lasted approximately eight minutes, the manager walked away. The second occasion was similar, with a manager briefly observing card solicitation activity, interrupting the conversation, and informing the employee that "what she was signing was something like a contract."

The Law

Section 8(c) of the National Labor Relations Act (NLRA) states that "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." Essentially, this section protects

an employer's right to free speech during a union campaign so long as its actions are not otherwise unlawful.

The Decision

The Unions filed an unfair labor practice charge against the Aladdin, claiming that the managers' interruption of the employees' conversations constituted impermissible surveillance of union activity. The administrative law judge initially sided with the Unions, but a majority of the NLRB panel reviewing the administrative judge's opinion found that the Aladdin had not broken the law.

Specifically, the Labor Board held that in determining whether an employer's actions in observing employees and interrupting them to express anti-union views amount to an unfair labor practice, the judge should look for "indicia of coerciveness" including the duration of the observation, the manager's distance from the employees while observing them, and whether the manager engaged in other coercive behavior during his observation.

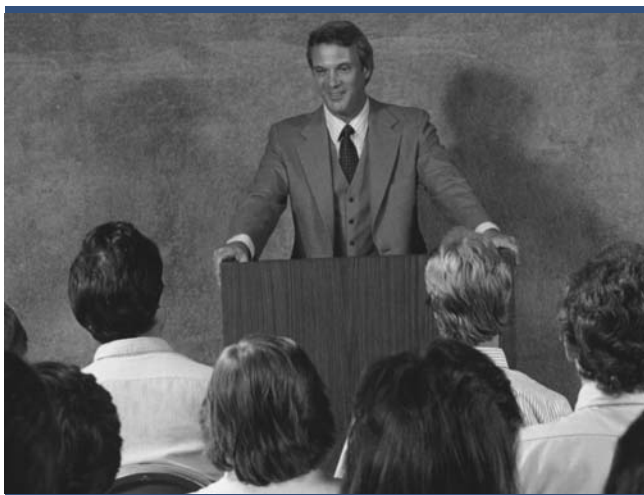
Examining the Aladdin managers' conduct in terms of these "indicia of coerciveness," the NLRB held that managers briefly observing the employees' conversation and then offering the employer's viewpoint was not an unfair labor practice. The Unions petitioned the Ninth Circuit for review of the NLRB's decision.

On January 28, 2008 the Ninth Circuit denied the Unions' Petition for Review, and held that the NLRB's decision should stand on both the law and the facts. The Court found that the NLRB's "indicia of coerciveness" test was "rational and consistent" with the NLRA. Moreover, the Court agreed with the NLRB that the Aladdin managers' "brief, spontaneous interruptions" were short in duration, that the managers' conduct was not "out of the ordinary," and that "verbally interrupting organizing activity does not necessarily violate" the NLRA.

Lessons Learned

In holding that interruption of employees' organizing "does not necessarily violate" the NLRA, the Ninth Circuit emphasized the complexity of interacting with employees during a union campaign. A determination of whether an employer's actions are lawful under the NLRA is a fine one. Although this case (handled by Fisher & Phillips lawyers) marks a substantial victory in maintaining an employer's right to express its views on unionization, future instances will be examined on a case-by-case basis, making careful crafting of an employer's message during a union organizing of tantamount importance.

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Continued from page 2

guidelines, when tipped employees spend more than 20% of the time performing general preparation work or maintenance, then no tip credit may be taken for the time spent performing those non-tip duties, and the employer must directly pay at least the minimum wage for all non-tip work. Fast claimed that Applebee's shortchanged him because he performed various non-tip duties that exceeded 20% of his time, but Applebee's didn't pay him the full minimum wage for those non-tip duties.

The court noted that Fast did not necessarily have evidence to show that his non-tip duties exceeded 20% of his work time. The court left this

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as an open question for trial, but specifically rejected Applebee's argument that since the non-tip duties that Fast described were all included within his written job description, they did not need to be separately compensated because they were all part of his "occupation" as a bartender.

The Problem With the Court's Approach

The operational problems that could arise from the court's approach are significant. The word "micromanage" comes to mind. Restaurants would have to monitor every tipped employee on every shift, and then evaluate the specific tasks performed against the employee's rate of pay – literally by the minute. Picture a manager standing by, stopwatch in hand, while a server or bartender performs set up work.

There are two alternatives to handling the problem, should the court's reasoning become widely accepted, neither attractive. One would be to stop employees from working, or reassign their duties, when they approached the DOL's 20% limit, to ensure they do not exceed it. (Incidentally, this limit is contained in DOL's Field Operations Handbook, which is not binding on the court). The other is to ensure that the employee is paid at two rates: the tipped minimum wage rate for the tipped work, and the regular minimum wage for the non-tipped work. (And remember that not all jurisdictions even allow for the tip credit. It is a federal law, but some states require the full minimum wage for all employees).

Even a detailed job description would not be a good defense since both the DOL and courts look to the actual working time spent by the employee on each task.

Other similar cases are out there, and at least one has ruled the other way, i.e. in favor of the employer, and criticized the *Fast* court in doing so. *Pellon v. Business Representation International, Inc* involves skycap Jason Pellon who, along with others, raised the same claim as the bartender in *Fast*. The court addressed the issue of how, and whether, to try and allocate how much of an employee's day is spent in any one particular duty, and took a swipe at the *Fast* decision in doing so. Here is how the judge in that case put it:

"Plaintiffs further rely on *Fast v. Applebee's International Inc.* for the proposition that an employee's duties incidental to direct tipped duties may not exceed 20% of their time without the employee being compensated with at least minimum wage for that period of time....However, a determination whether 20% (or any other amount) of a skycap's time is spent on non-tipped duties is infeasible. In fact, several of the plaintiffs themselves have admitted that dividing their workday among the various tasks they perform is impractical or impossible."

"Permitting Plaintiffs to scrutinize every day minute by minute, attempt to differentiate what qualifies as tipped activity and what does not, and adjust their wage accordingly would create an exception that would threaten to swallow every rule governing (and allowing) for tip credit for employers. First of all, ruling in that manner would present a discovery nightmare. Of greater concern is the fact that under the reasoning proffered by Plaintiffs, nearly every person employed in a tipped occupation could claim a cause of action against his employer if the employer did not keep the employee under perpetual surveillance or require them to maintain precise time logs accounting for every minute of their shifts."

Conclusion

The situation bears watching. A bad decision would technically only be precedent in the particular jurisdiction of one Missouri court, but courts' decisions in one location have a way of influencing those in others, and a trend in this direction could spell big trouble for all employers of tipped employees.

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