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Panel Revives Clerk's Suit Alleging Discrimination Over 'Tomboyish' Look

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Brenna Lewis is an Iowa woman who describes her appearance as "slightly more masculine." Lewis prefers to wear loose-fitting clothing, including men's button-down shirts and slacks. She avoids makeup and wears her hair short. At times, Lewis has been mistaken for a male and referred to as "tomboyish." One of her supervisors allegedly characterized Lewis' look as "an Ellen DeGeneres kind of look."

None of these things would have mattered, though, if it were not for her employer, who allegedly thought that she just lacked that "Midwestern girl look" and was not quite pretty enough.

In the recent decision *Lewis v. Heartland Inns of America LLC*, the 8th U.S. Circuit Court of Appeals reversed the district court's grant of summary judgment for the employer and found that the plaintiff presented sufficient evidence to make out a prima facie case of unlawful sex stereotyping and retaliation based on the foregoing evidence.

In *Lewis*, the plaintiff had been working for the Iowa hotel chain Heartland Inns for about a year-and-a-half. She worked in various positions at multiple hotels and consistently received high praise for her performance. Then, her direct supervisor got phone approval from the director of operations, Barbara Cullinan, to give the plaintiff the daytime shift at the front desk of one of the hotels. Lewis alleged she worked in this position for almost a month with no problems — until Cullinan came in and actually saw the plaintiff for the first time, according to the opinion.

The plaintiff's "tomboyish" style of short hair and loose-fitting clothes took the hotel, in Cullinan's opinion, "two steps back," Lewis alleged. While the plaintiff was reportedly well-liked by customers, Cullinan was apparently more concerned about having the front desk staffed by someone with the "Midwestern girl look." The plaintiff's "look" was not stereotypically feminine enough to meet the "pretty" standard that Cullinan thought the hotel should have, Lewis alleged.

Cullinan discussed the appearance problem with the plaintiff's supervisor, and then ordered the plaintiff's supervisor to reassign the plaintiff to the overnight shift. The supervisor refused, and Cullinan allegedly responded by insisting the supervisor resign, the opinion said.

Just days after discussing the plaintiff's appearance "issues" with the plaintiff's supervisor, Cullinan purchased video equipment to set up at the hotel. This way, she would be able to have a visual inspection of a prospective employee

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rather than relying on a phone discussion. In response to a question by another employee, Cullinan allegedly explained that she was doing this because employees need to have the right appearance for the hotel, the opinion said.

Taking matters further into her own hands, Cullinan allegedly said she was instituting a new hiring procedure that involves a second interview for the front desk day shift position. She called the plaintiff into such an interview, during which the plaintiff objected to this new procedure and being singled out for her appearance. Three days later Cullinan terminated the plaintiff for alleged hostility toward recent policies and thwarting the new interview procedure, the opinion said.

Unsurprisingly, the plaintiff alleges that this second interview procedure and the reasons given for her termination were pretext for discriminatory animus. The employer had a comparable dress code for men and women, so there was no direct allegation against the official dress code. Instead, Lewis alleged that Heartland was enforcing a "de facto requirement that a female employee conform to gender stereotypes in order to work [the daytime front desk shift.]" She also claimed that a reason for her termination was retaliation to her objection to this practice.

It is well established that Title VII prohibits discrimination against an individual because of sex, which includes sexual stereotyping. Employers cannot hold employees to their own standards or societal standards of how men or women should be acting or dressing. Stereotyping cases have arisen when, for instance, service industries require female employees to wear sexy outfits or to meet unfair weight restrictions, as well as when a female in the corporate world is denied partnership because she is too macho and does not wear makeup or dresses.

While employers are not prohibited from having grooming or appearance standards for their employees, the standards must be comparable for men and women or must be bona fide occupational qualifications. Clearly the 8th Circuit is not inclined to think having a "Midwestern girl look" is a job requisite for working in a hotel. In this case, the employer is likely to have a difficult time arguing otherwise since its employee manual focuses on what skills are needed to do the job and not on what one must look like in order to do the job.

The district court granted summary judgment to the defendant because Lewis did not present evidence that similarly situated men were treated differently. The 8th Circuit reversed and remanded, explaining that such evidence is not required to make out a prima facie case of discrimination. The inquiry is into the treatment of the employee alleging discrimination and whether that treatment amounted to discrimination that would not occur but for the employee's sex. In sexual stereotyping cases, the use of comparative evidence can be useful but is not always available — or necessary. Here, the 8th Circuit certainly did not think it was necessary as the plaintiff alleged a sequence of events that started with the director of operations being upset about an employee not looking "pretty" enough, and ended with the director of operations terminating that employee and purchasing video equipment for approving of future hires.

The 8th Circuit concluded that a reasonable factfinder could find that requirements of being "pretty" and having a "Midwestern girl look" were requirements imposed upon this employee because she is a woman. Thus, the plaintiff made out a prima facie case of discrimination because of her sex, and the defendant was not entitled to summary judgment.

While it might seem that the implications of the *Lewis* holding are far-reaching, the 8th Circuit simply highlighted an area of the law prohibiting sex stereotyping that has been around since Title VII became law in 1964. What is most interesting, and perhaps most revealing about the decision, is the fact that the decisionmaker in this case was a woman herself.

The *Lewis* holding should give comfort to employees who may feel compelled to conform or dress and look a certain way to gain the approval of their employer. Stereotypes encompassing gender roles in the workplace can be painfully ironic, especially when doled out by members of the same sex. The *Lewis* decision represents a positive step toward ensuring that you do not have to be "pretty" or even look like a Midwestern girl to do your job well. •

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