
**Let's get
physical!**

**Getting
real
about
body
inclusion**

By Bendita Cynthia Malakia and Morgan Reams

Would you ever tell someone that they might win over a diverse jury because they “look exotic”? Would it be acceptable for a colleague to ask another of South Asian descent, “Where are you really from”? Would it be ok if an LGBTQ+ attorney was passed over for a leadership role because it wasn't clear how the client would receive them?

In each of these instances, the answer is a resounding NO (maybe even with an expletive)! These examples reflect implicit biases that are often experienced based on gender, race/ethnicity, and LGBTQ+ identity. If we are not comfortable with these types of comments, then why do so many of these types of comments pass unnoticed or are even supported? Let's look at a few more examples:

“We need a lawyer that will be disciplined; at their weight, it's definitely not them.”

“He is 6'2” so he just looks like he should lead.”

“I hate to say this, but it's just improbable that we'll put someone that unattractive in front of a client.”

“Their teeth will be too distracting for a jury.”

“She's bald so she's either ill or a ballbuster – either way I don't want her.”

“I don't know how they are going to get through an interview with their face like that.”

These types of comments, about those with atypical physicality, are examples of physicality bias.

Physicality bias is too often deemed acceptable and justified

While explicit and implicit biases implicating gender, race/ethnicity, and LGBTQ+ identity are widely recognized as unacceptable in the legal profession, physicality bias is an explicit bias that is often deemed justified. In fact, as one person who we surveyed noted, physicality bias “is so pervasive that I have a million stories, there is no purpose in recounting one. This is just what I live with.”

The Implicit Association Test (IAT)¹ is designed to uncover individuals' subconscious associations between concepts and stereotypes. The tests have been taken millions of times by individuals around the globe on the basis of a variety of demographic identity and social concepts. In a 2014 IAT study,² Sean M. Phelan, PhD, MPH and colleagues revealed

that weight bias tends to be more tolerated than biases related to race, gender, or sexual orientation.

Physicality bias is broader than just about weight, although weight plays an outsized role in the research and discussion. It is the implicit or explicit bias based on an individual's appearance outside of characteristics like gender, race/ethnicity and disability – although these identities certainly play a role and physicality bias impacts different people differently. Often, physicality bias is a specific category of appearance bias focused on physical attributes that are immutable or not “easily” changed.

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Known by various names such as beauty bias, lookism, attractiveness or appearance discrimination, and pretty privilege, physicality bias impacts each of us in overt and subtle ways. For those with sight privilege, humans are predominantly reliant on visual cues, and our primitive brains instinctively form judgments based on traits that are identified as aligning to a better chance of corporeal and genetic survival. In addition to weight, physicality bias may arise with respect to body shape/proportionality, height, facial symmetry, teeth whiteness/alignment, or hair texture/absence of hair (e.g., baldness).

There are myriad stereotypes that align with physicality bias that may be readily identifiable. For instance:

- Fat (and note, we use “fat” here rather than “overweight” or “obese” as those are medical diagnoses, whereas “fat” is based on perception) employees may be unfairly

perceived as lazy, unmotivated, undisciplined, and unprofessional.³

- Taller individuals are often regarded as more capable, dominant, and charismatic.⁴
- Individuals with symmetrical facial features are deemed more successful long-term.⁵
- Women with larger breasts are unfairly dismissed as unintelligent.⁶
- Individuals with naturally curly hair textures are scrutinized for appearing unkempt and unprofessional.⁷

These are just a few manifestations of how physicality bias permeates daily interactions.

While many perceive weight and body type to be within one's control, there is enough evidence that many other factors can impact one's weight and body type, including genetics, environmental factors, race, ethnicity, gender, etc.

Co-author Bendita Malakia periodically hosts trainings on various subjects to boards, executive teams, individuals, and organizations on inclusive leadership and to support them in leveraging an equity and inclusivity perspective in their roles. For leaders to do this, it is imperative that individuals interested in increasing their inclusivity quotient focus on their capacity for empathy, humility, and vulnerability. One of the many ways this plays out is to ask participants to share a bias that they have with the group. Whether live or virtual, participants can share orally or via writing to be accessed by all (e.g., the chat function or post-its on a board). To lead by example, Bendita always shares her implicit biases first, as revealed to her by many years of taking the IAT and observing (and correcting) her own behaviors.

Unsurprisingly, this is a hard exercise. For lawyers or business professionals in legal organizations,

individuals are prone to ask themselves: Am I really acknowledging that I have biases? *Am I really admitting to my biases to others, publicly? I can go along with this "unconscious bias" concept, but my culpability and liability increases markedly once I admit it.* It usually takes participants a bit of time to get their bearings, process all the emotions (typically fear, nervousness, anxiety, etc.) and then remember they pledged to occupy brave space and a growth mindset during the session. The vast majority of the time, participants do one of three things:

1. They are silent and non-responsive (~10%).
2. They are evasive, providing answers such as: *I am sure I have something, but I can't think of anything right now. They ARE supposed to be unconscious, right? (~35%).*
3. They will assert a physicality-based bias, usually weight-related, such as: *Well, I DO think that fat people lack control / are undisciplined / aren't organized / are lazy / are unmotivated / other stereotype about fat people (~50%).*

We all have implicit biases on traditional categories too, and I suspect more of us know what ours are than we admit. The idea that of all the biases, the one individuals feel most confident in pronouncing publicly is about the perceived moral failings of fat people. Identifying as a fat fluid individual, having occupied many weights along the spectrum from 163 lbs to nearly 400 lbs during her professional life, Bendita is both disheartened and intrigued by weight bias being the bias that individuals are most willing to openly express. In our view, this demonstrates a level of ignorance about weight and physicality more broadly that one might have seen levied against women and racialized individuals in a less enlightened era. A focus on weight and body type in this instance is intentional – the other areas of physicality bias have less stigma because society doesn't tend to assign as much responsibility to an individual for their height, or their dental structure (though they may correctly or incorrectly assign a socioeconomic class), their facial features, or their perceived attractiveness. While many perceive weight and body type to be within one's control, there is enough evidence that many other factors can impact one's weight and

body type, including genetics, environmental factors, race, ethnicity, gender, etc. Deciding one is “at fault” for their condition is often enough for individuals to feel justified in their having a physicality bias. Whether a factor is at play that is perceived within one’s control or not, perceptions on physicality impact one’s progression and experience in the legal profession.

Physicality bias impacts inclusion and advancement

A directed focus on body inclusion in the context of the legal profession feels incongruent, not least because legal professionals tend to be highly educated and analytical and are valued for those attributes. A focus on appearance may feel shallow or overblown because it is often thought that it is intellectual heft that matters, not how attractive one is. One can imagine the overly tread phrases from the land of racial defense retorts: *I don't care about what someone looks like – they can be green, purple, blue, or whatever – I care about what they can do; I care about the merits.* That was not accurate then and it isn't accurate with respect to physicality. As a society, and as a profession, we care about appearance and our brain operates using schemas to align social ideas to physicality attributes.

We posit that the inequitable benefits and detriments that align with that caring results in those with atypical physicality experiencing inordinate barriers to access and progress within the legal profession. Physicality bias also has an impact on feelings of inclusion, belonging, and wellbeing, which impact retention and performance. When you are distracted by microaggressions or feelings of exclusion, it is a challenge to do your best on your substantive work and to connect with others. While the research on physicality bias in the legal profession is scant, the legal profession isn't immune to the explicit and implicit biases experienced on the basis of other demographic and social identities.

From multi-stage law school admissions processes to the complex dynamics of navigating a path to partnership, the overt and subtle sways of physical appearance mold opportunities, perceptions, and outcomes, perpetuating disparities and

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undercutting the bedrock tenets of meritocracy and the promise of diversity, equity, and inclusion (DE&I). Some examples and implications of physicality bias follow, primarily in the contexts of the law school experience, recruitment, access to opportunities and interactions, intersectionality, the legal landscape and proxy protection, and compensation.

The law school experience

Recruitment practices, coupled with the biases of educational administrators, have a compounding effect. Research by David L. Wiley in 1995⁸ unveiled this reality, exposing how educational administrators often favor physically attractive students over similarly qualified but physically unattractive ones. Consequently, retention rates plummet, and class participation wanes as individuals shrink from drawing attention to themselves. The negative self-concept that results stifles future advancement as negative perceptions of immutable attributes persist throughout individuals' professional careers.

Recruitment

Sharon Grant and Toby Mizzi note⁹ that individuals that are obese are judged as less attractive and less hireable; that overweight people are 35% more likely to experience bias in higher profile jobs; and that overweight women are more likely to experience bias than overweight men. Additionally, in “Weight Bias in the Workplace” in 2013, Grant & Mizzi report that obese applicants received 20% fewer interview

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calls than average weight applicants, suggesting that it isn't necessarily capability that gets the interview.

Opportunities and interactions

Mentoring, training, leadership opportunities, and an overarching sense of belonging are also impacted by physicality bias. Individuals with normalized physicality and ideas of professionalism often enjoy advantages, ranging from heightened perception of promotability to easier networking access. A survey by Matt Gonzalez in 2023¹⁰ revealed that half of managers expressed a preference for interacting with employees who are not overweight. Additionally, legal headhunter Tariq Sheikh observed in 2023¹¹ that attractive individuals are commonly perceived as more trustworthy, confident, and likable – qualities highly valued in the legal profession and, one can imagine, among colleagues and clients alike. While physical attributes ought not be leveraged as proxies to determine access to opportunities and success, in the absence of other guidance and monitoring, societal norms perpetuate physicality biases leading to disparate outcomes for those with normalized and atypical physicality.

Intersectionality

Identity is multi-layered. While we have attempted to fictitiously separate traditional demographic identities like gender, race/ethnicity, and LGBTQ+ identity from the physicality conversation, as one might expect, there are interlinkages. Some people have more license to be tall (e.g., white men) than

others (e.g., Asian women). Socioeconomic class or social mobility are often inferred by the straightness and whiteness of one's teeth. Villainization of hair texture has received considerable treatment as being indelibly linked to various race/ethnicity and gender permutations. Adding an additional marginalized identity like a physicality bias for an individual that already navigates life with other marginalized identities can often only complicate their experience in a way that is synergistic and not merely additive, causing them to experience profound exclusion and additional barriers to access opportunities. Affinity bias (or being unconsciously inclined to offer more benefits and assign fewer penalties to those like them) is real, and overcoming obvious dissimilarities to find more substantive, but perhaps hidden, commonalities may be a bridge too far. By acknowledging the intersectionality of weight bias, we can work towards creating workplaces that embrace diversity in all its forms and foster a culture of belonging for everyone. As one might imagine, the impacts ripple beyond individuals and significantly impact organizational culture and practices. An intersectionality analysis highlights that when appearance is perceived to align with competency, DE&I efforts may suffer.

The legal landscape and proxy protection

From a US perspective, there are not many jurisdictions that offer specific legal protections for those based on their physicality. In other words, in most jurisdictions it is lawful to deny individuals opportunities based on perceived attractiveness, weight, height, body type, facial asymmetry, or other physicality attributes. Jurisdictions that have anti-discrimination laws on the basis of height and weight in one or all of employment, housing, and places of public accommodation such as airlines, hotels, and restaurants, include the cities of Binghamton, NY, Madison, WI, New York, San Francisco, Santa Cruz, CA, Urbana, IL, Washington, D.C., and the state of Michigan. Other states, including Massachusetts, New Jersey, New York, and Vermont have pending legislation on the basis of height and weight discrimination. Some believe that disability laws protect individuals from physicality bias, but there is only partial

protection available for those who fit under the Americans with Disabilities Act framework in the US, such that atypical physicality impacts what is deemed to be a major life function. We are not aware of other disability legal frameworks, but are hopeful that other jurisdictions offer additional protection and support to those with atypical physicality.

The CROWN Act¹² has received more traction. CROWN, or Creating a Respectful Open World for Natural Hair, prevents legal discrimination on the basis of an individual wearing their natural hair and styles that are central to specific racial/ethnic groups. Having been passed in 24 US states and 40 additional localities, the CROWN Act may be evidence that proxy protection works or that there was some mileage from the impact of the murder of George Floyd.

Given inconsistent and often nonexistent legal protection on physicality, intersectionality offers the hope of proxy protection, which is defined here as leveraging legal protections for overlapping or aligned identities such as membership of a legally protected class, like gender, race/ethnicity, or LGBTQ+ identity. An illustrative example lies in the historical discriminatory practices surrounding entrance and promotional exams within certain police departments. Prior to the 1970s, prospective male candidates were required to meet a height requirement of at least five feet and nine inches to be eligible for recruitment. This criterion posed a significant obstacle for individuals of Mexican descent, whose average height tended to be lower compared to other nationalities. Addressing this issue, the Latino Justice Puerto Rican Legal Defense and Education Fund, a prominent Latine legal advocacy group based in New York, undertook a decade-long legal battle aimed at increasing access to law enforcement agencies. According to Suzanne Gamboa in 2020,¹³ such barriers were successfully removed through litigation against the New York Police Department. This exemplifies a noteworthy instance where race-based protections offered an avenue to combat physicality bias in a way that would support a broader population, also serving as an excellent reminder that equitable practices for one group tend to have a broader positive impact.

Compensation

Such findings echo M. Dittman's 2004 research,¹⁴ revealing that, on average, individuals towering at six feet tall earn nearly \$166,000 more over their careers than their counterparts that are five feet five inches tall. These statistics underscore society's inclination to put a monetary value on those extra inches, assigning a success value with increased height, irrespective of similar educational and professional backgrounds.

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Earnings are also impacted by weight. In 2021, Nico Pronk reported¹⁵ that obese women earn as much as 12% less and are more likely to be in low paying jobs than thinner women. Additionally, Pronk found that men impacted by obesity are underrepresented in managerial and professional positions and are paid less than men not affected by obesity.

This quick trip through various employee lifecycle stages and the scant legal protection currently offered demonstrates that there is much to do to protect the experience and opportunity of those with atypical physicality.

What can we do?

It is our hope that you are convinced that people should not get paid less because they are short, nor should they have fewer opportunities because others perceive them to be unattractive. With so many factors at play and the broad acceptability of physicality bias, one might wonder what can and should be done. Here are some institutional and

individual opportunities that we recommend embracing if one wants to expand their inclusivity capacity to include physicality, whether through their organizational operations, as a leader or manager, or as an individual who wants to be a more supportive colleague.

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Institutional opportunities

- *Take allegations seriously.* As organizations ought to do with individuals from any marginalized background, believe the stories of individuals with atypical physicality when they share them with you. They may experience shame and may anticipate ridicule, which can be (re)traumatizing. It is important that organizations do not minimize their experience and take allegations of physicality bias or differential treatment seriously. Allegations of appearance discrimination and physicality bias deserve investigation and further inquiry.
- *Pay attention to legal requirements.* Is important for both institutional and individual protection to be aware of the jurisdictions that have legal protections for appearance discrimination. Incorporate awareness of the requirements into any standard employment/HR training that you perform related to discrimination and harassment.
- *Create a zero-tolerance policy on weight discrimination.* Make it known within your organization that discrimination on the basis of weight, as the most pervasive physicality bias, is not permitted and ensure that such

policy or any attendant guidelines are part of your standard employment/HR training.

- *Apply dress codes fairly.* Ensure the equitable coverage and enforcement of dress codes, making sure that individuals of different weights, heights, and body types meet the same expectations for professionalism. Notwithstanding the foregoing, it also remains important to be supportive of personal decency in the fair application of dress codes.
- *Educate your people about physicality bias.* In the same way that there are trainings and additional education about other demographic identities that experience bias, make sure your colleagues understand the legal and cultural understandings of physicality bias and how to identify it, prevent it, and remedy it.
- *Understand the intersectional and pretextual impact.* Even if a jurisdiction doesn't offer legal protection against appearance discrimination and physicality bias, understand that the organization may still be at risk of liability owing to proxy protection given some physicality characteristics aligned with protected classes. Understanding how atypical physicality intersects with traditional demographic diversities can make for a more robust DE&I offering and ensure that members of protected classes aren't experiencing disproportionately negative outcomes through pretextual actions.
- *Expand your understanding of what constitutes diversity, equity, and inclusion.* Introduce physicality bias as a component of your DE&I strategy, especially from an inclusion and belonging perspective.
- *Make resources easily accessible.* Create a one-pager of any physicality-supportive resources, from benefits to alternative adjustments to wellbeing supports.
- *Beef up your benefits.* Make GLP-1s (e.g., semaglutides like Ozempic, Mounjaro, and Wegovy) a part of your health benefits and eliminate discriminatory policies such as Body Mass Index requirements around insurance requirements.
- *Establish systems to evaluate external opportunities.* Whether it is thinking about

who gets featured on the website, is interviewed, or is established as a liaison to clients, the community or other external stakeholders, ensure that skills and capabilities drive appointments and designations rather than appearance.

- *Photos.* Eliminate or significantly reduce the practice of photographers editing school or office portraits to fit a firm standard (e.g., reducing gaps in teeth, adjusting hair volume, providing facial symmetry, or reducing ear size), which often makes assumptions about normalized physicality. At the very least, ask the individual before editing and give them an option.
- *Seating, access, and activities.* Pay attention to seating, especially static chairs attached to desks or permanent seating fixtures, to ensure a variety of body sizes and heights can learn and work comfortably. Think about where events are hosted. *Is that rooftop accessible via elevator or only a staircase?* Think about whether there are meaningful opportunities at that amusement park gathering for all members of your organization to enjoy themselves. Scrap those weight loss competitions and reframe initiatives to support health-based practices.
- *Gifts.* Think twice about gifts and swag that are size-based, whether clothes or accessories. It may be beneficial to avoid clothing entirely or, alternatively, ensure that there are a large variety of sizes and lengths available.

Individual opportunities

- *Interrupt inappropriate comments.* When you witness any physicality-based microaggressions, or other biased or unacceptable comments, interrupt the individuals in the moment or privately, as appropriate. Allowing inappropriate comments on someone's body to remain uninterrupted is an implicit validation of the sentiment behind the comments and can make the subject of the comments feel even more excluded. Going further, it is suggested that it is never appropriate to comment on

other people's bodies, unless you want to inform them about a circumstance that could potentially be embarrassing for them, such as an unzipped zipper or lipstick on one's teeth.

- *Quit the jokes.* The adage "*There is truth in jest*" feels instructive here. For those who have experienced physicality bias, body-related jokes are extremely harmful and often lead to those individuals feeling less included. Physicality-based jokes don't have a place in the workplace.
- *Avoid certain food commentary.* Avoid comments about the amount or types of food that others are eating, whether it is intended as a compliment or criticism. Praising a fat person for eating healthily may be just as offensive as a weight-based slight, and may be received as a microaggression. Unless serving as a requested nutrition accountability partner or providing a requested opinion, there is little to gain from an individual feeling as if their consumption is being monitored.

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- *Keep learning.* Include ongoing learning about physicality bias in your continuing education, especially areas where physicality is normalized or there is less familiarity. Incorporate and share any learnings with others.
- *Avoid making decisions based on physicality.* Notice when internal assessments or conclusions are drawn based on appearance in everyday life. Be aware of any observed

defaults and ensure that decisions made are not based on those biases.

- *Use the terms “skinny” and “fat”.* This may be controversial because “fat” can be a loaded term and some could receive it negatively based on their own histories. Here we follow the trends of body positivists and physicality progressives that suggest that using the terms “skinny” and “fat” are more appropriate than terms like “underweight”, “overweight”, and “obese.” The latter terms are considered to be medical diagnoses that those who are not medical professionals are not qualified to determine. “Skinny” and “fat” are perceptions, whether self- or other-imposed, and best encapsulate the positive, neutral, and negative connotations that most are trying to communicate when using those terms.

The way forward

Like other areas of discrimination and bias, physicality bias – or lookism, pretty privilege, beauty bias, appearance discrimination – has a significant impact on the ability of individuals with atypical physicality to enter, experience belonging, and advance in the legal profession. Unlike other areas of discrimination and bias, physicality bias tends to be justified by those that hold it, as if having atypical physicality is a moral or competency failing. Continuing to self-educate and encouraging organizational education about physicality bias is an initial action that should be taken to combat this explicit and implicit bias. Whether it is ensuring that organizations take allegations of physicality bias seriously or interrupting body-based jokes, making progress on the institutional and individual actions that can make body inclusion real should be a priority in the DE&I landscape.



Bendita Cynthia Malakia (she/her) is a Black bisexual fat-fluid woman who aims to ensure that individuals that are underrepresented, underserved, and underestimated can thrive in the workplace. She is the director of diversity and engagement at O’Melveny & Myers, is president of the National LGBTQ+ Bar, and coaches and advises boards and executive teams on increasing their diversity, equity, and inclusivity capacities. Previously, she was a finance lawyer at an AmLaw 100 firm, at Goldman Sachs, and International Finance Corporation. She matriculated at Barnard College and Harvard Law School. A catalyst and connector, Bendita is down for the folx.



Morgan Reams (she/her) is an accomplished professional within the social sector, demonstrating a profound dedication to advancing racial justice, economic equity, and inclusive democracy. In her role as co-founder of BlackWomen&, she not only amplifies Black women’s voices but also drives strategic growth, cultivates partnerships, and advocates for diversity, equity, and inclusion. With extensive experience garnered at Title Nine and the William and Flora Hewlett Foundation, Morgan possesses a comprehensive skill set in program development, grant administration, and organizational effectiveness, with a notable emphasis on empowering marginalized communities and catalyzing systemic change. Recognized as a collaborative leader, Morgan remains steadfast in her commitment to fostering positive change and advancing social justice initiatives.

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