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THE SKINNY ON THIN: GETTING TO A HEALTHY RUNWAY

Madrid's fashion shows last March kicked off the discussion over how much a fashion model should weigh, by announcing that no model could walk their runways unless her body mass index (BMI) — that is, her weight (in kilograms) divided by her height (in meters) — equaled at least 18. In November, 2006 a 21-year-old Brazilian model, Ana Carolina Reston, died of complications from anorexia nervosa. Her BMI of 13.5 was below the level regarded as a clinical indicator of starvation.



After Reston's death, the mayor of Milan took matters a step further, by urging the city's fashion houses to adopt a code of "ethical self-regulation." Then the Italian Minister for Sports Activities and Youth Programs upped the ante again, by issuing a manifesto, calling for use of the BMI standards, a "license" demonstrating good health and a minimum age of 16 for models. Although the Italian "National Manifesto of Self-Regulation by Italian Fashion Against Anorexia" is not legally binding, industry sources suggested that those who got out of line would be punished. At a signing ceremony attended by several government ministers, the head of the Italian Chamber of Fashion expressed the hope that uniform international restrictions could be agreed, and dispatched copies of the manifesto to industry groups in Paris, London and New York.

The British Fashion Council recently wrote to designers before the start of British Fashion Week, urging that designers use "healthy models" but decided against rules restricting designers' selection of models. In the U.S., the Council

of Fashion Designers of America (CFDA) has issued guidelines, calling for a minimum age of 16, education on eating disorders and nutrition, requiring models with eating disorders to seek help, the provision of water and healthy food at shows and the prohibition of tobacco and alcohol backstage. The CFDA held a high-profile conference during Fashion Week on the topic.

As a practical matter, it would be risky for the fashion industry in the U.S. to do more than make suggestions, for several reasons. First, many medical experts assert that eating disorders are a disease. Depending on the circumstances, then, anorexia could be considered a disability. Refusing to hire someone who is otherwise capable of performing the essential functions of the job because that person has a disability may violate federal (Americans with Disabilities Act), state (New York State's Executive Law) and local (the New York City Human Rights Law) laws. In fact, the industry may have to make reasonable accommodations for models with eating disorders, unless this would cause the employer undue hardship.

Second, different ethnic and racial groups may have different height and weight characteristics. The Italian manifesto makes some allowance for this. In the U.S., however, a limitation which has a disparate impact on a racial or ethnic group can be unlawfully discriminatory, opening the door to liability under Title VII of the federal Civil Rights Act as well as state and local law.

Third, what if the buzz in Milan is borne out, and a designer that sends out too skinny a model is "punished"? Domestically, "punishment" would put the industry at risk of lawsuits brought by excluded models and designers arguing a group boycott or other violation of the antitrust laws. The industry has had past antitrust run-ins, for example, with the Federal Trade Commission over efforts to control knock-offs. Not to mention the potential exposure to breach of contract claims (from the model against the house) or tortious interference claims (by the model or the house against the guideline-setting group).

Nor should foreign houses assume this is purely an American problem. While Italy may smile on a designer from Milan who follows the manifesto at fashion shows in Italy, that wouldn't protect the house against claims arising out of a show in New York. An American outfit applying the rules, even in Italy, still might have liability for violating U.S. law.

"CFDA is to be praised for highlighting this important issue," says Patricia Costello Slovak, Schiff Hardin partner and current Chair of the American Bar Association Section of Labor and Employment Law. "But the devil (by whomever dressed) is usually in the details, and, without careful legal counsel, good intentions could pave the path to Court."

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