

Reproduced with permission from Human Resources Report, 31 HRR 985, 9/23/13. Copyright © 2013 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

Discrimination

Prejudice Against 'Unattractive' Workers Can Have Ugly Ramifications for Employers

An employee's looks can cause co-workers to treat him or her differently, according to a recent scientific study in the journal *Human Performance*. And according to employment attorneys, that can cause legal problems for employers.

"Beauty, Personality, and Affect as Antecedents of Counterproductive Work Behavior Receipt" by Brent A. Scott of Michigan State University and Timothy A. Judge of the University of Notre Dame, which was posted online in April, summarized the results of two studies of who is more likely to be on the receiving end of "counterproductive workplace behavior (CWB)."

In one of the studies, 149 full-time health care workers at a large hospital in the southeastern U.S. took part in an online survey. The researchers reported that "physically unattractive employees were more likely to receive CWB from their coworkers, at least when age is taken into account," and that "for two employees of the same age, the physically attractive employee is likely to receive more favorable treatment from his or her coworkers." This study and the companion study of 130 undergraduate students at a southeastern university also uncovered the effect of employee personality traits on CWB.

The lesson "for managers," according to Scott and Judge, is that "knowing who the targets of harmful behaviors such as CWB are likely to be" may help them mitigate or curb such behavior.

Attorney Michael S. Cohen, a partner with Duane Morris LLP in Philadelphia, said that employers need to be mindful of appearance bias. "One's gut reaction may be that there is nothing to this," he told Bloomberg BNA Sept. 18, but "there really can be legal consequences."

Federal and State Laws Implicated. Cohen said that appearance discrimination can be covered to different extents by federal, state and local anti-discrimination laws.

"There are legal ramifications in jurisdictions where appearance is a protected class," Cohen said. Examples include the state of Michigan, the District of Columbia, and the cities of San Francisco and Santa Cruz, Calif., and Madison, Wis.

In such jurisdictions, "one could make a claim based solely on physical appearance, although the number of such cases is low," Cohen noted.

He added that the issue has gotten a good deal of attention recently due to the case of a Fort Dodge, Iowa,

dentist who fired an assistant because his wife viewed her as a threat to their marriage based on the assistant's attractiveness (31 HRR 9, 1/14/13; 31 HRR 769, 7/22/13).

Although the Iowa Supreme Court twice ruled that the employer did not violate the state law barring sex discrimination, upholding a lower court ruling both last December and July 12, Cohen said the state supreme court noted that "if [the firing] was based on gender stereotypes, they might have reached a different decision."

While federal law doesn't address directly discrimination based on looks, there are numerous ways in which federal anti-discrimination statutes can come into play. For example, Cohen said, someone with a facial disfigurement or who is obese may have a protected disability under the Americans with Disabilities Act; or age as well as gender discrimination may be at play.

"Federal law doesn't prohibit discrimination based on looks," Linda Dwoskin, an associate with Dechert LLP in Philadelphia, said in a Sept. 18 interview with Bloomberg BNA. "So these issues, if they come up federally, will come up in another context."

What this means is that an employee who feels she has been fired based on her appearance won't file a federal claim stating she was dismissed for being "ugly" or for having a hair color her supervisor didn't like, but based on sex discrimination, religious discrimination (if religiously mandated dress was at issue) "or some other protected class," Dwoskin said.

Various studies have found that while men who are considered physically attractive almost always enjoy an advantage in getting hired, physically attractive women are at an advantage for some jobs but at a disadvantage for others, Cohen and Dwoskin each noted.

Avoiding Appearance Bias Complaints. For employers, guarding against employee or job applicant complaints that cite the employee's physical appearance as a factor means following the same best practices to prevent other discrimination claims, Dwoskin said. "The employer has to act consistently and in line with policy," she said. If an employee complains he is being let go because of appearance, "there has to be a legitimate, business-related reason" the employer can cite to justify the decision, she said, and the employer should keep all documentation relating to the decision about the employee.

Beyond looks, weight is liable to expand as a workplace issue, with courts recently relaxing the standard under which an employee or applicant can claim weight-based discrimination from "morbid" to "severe" obesity, Dwoskin said. "Employers shouldn't act based on someone's weight but on their performance and

qualifications,” she said. Which is good advice regarding physical appearance generally.

BY MARTIN BERMAN-GORVINE

To contact the reporter on this story: Martin Berman-Gorvine in Washington at mbermangorvine@bna.com

To contact the editor responsible for this story: Simon Nadel at snadel@bna.com