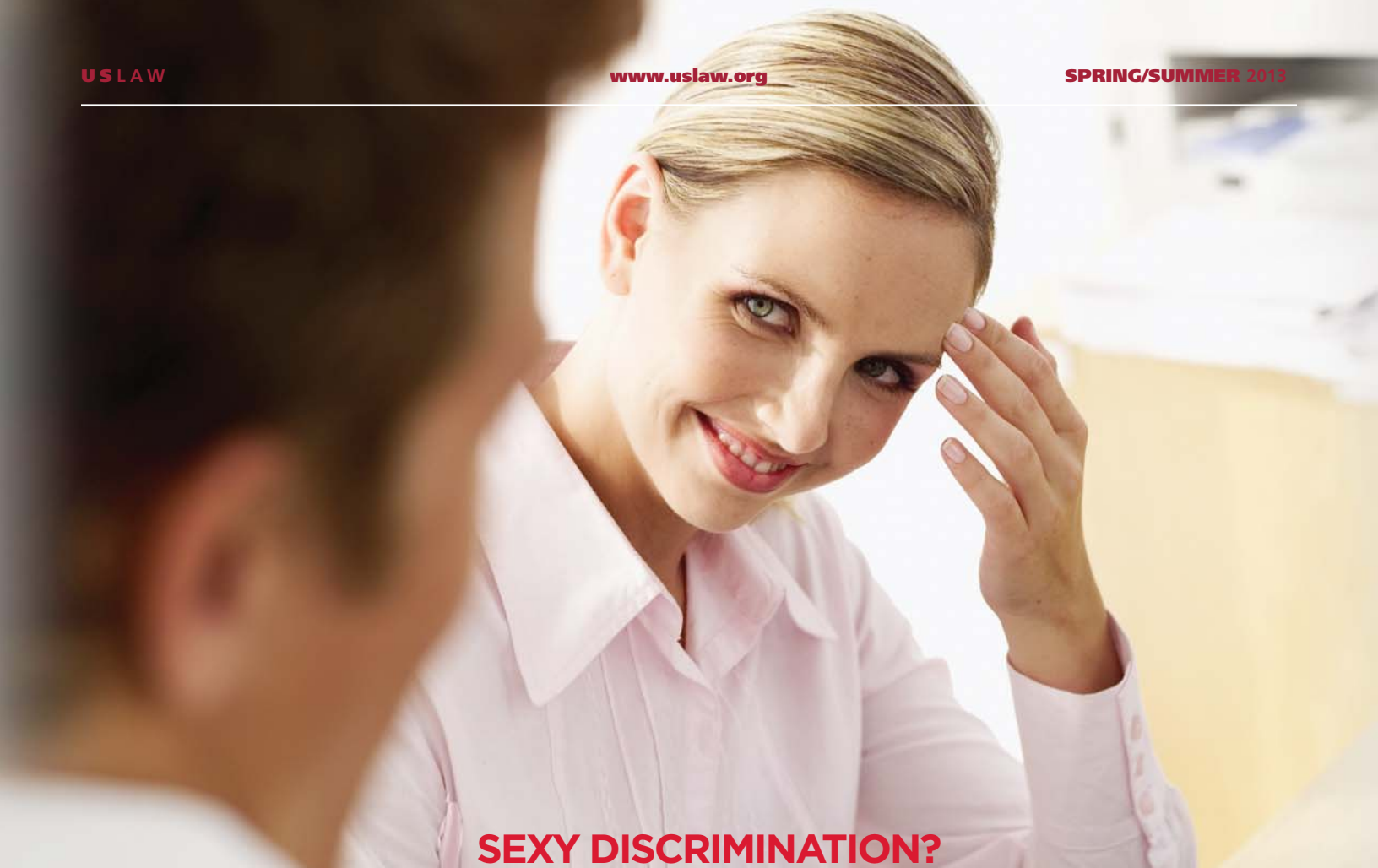

SEXY DISCRIMINATION?

FIRED FOR BEING TOO ATTRACTIVE: DOES THE LAW PROVIDE ANY PROTECTION?

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Title VII laws protect employees from discrimination on the basis of gender. However, a recent high-profile case in Iowa tested the boundaries of this protection, specifically for employees fired for being too physically attractive to their employers.

The case is *Melissa Nelson v. James H. Knight DDS, P.C. and James Knight*, 2012 Iowa Sup. LEXIS 111. Melissa Nelson is an attractive young woman who worked as an assistant to Dr. Knight, a dentist, for more than ten years. The record established she was a highly competent employee. During the last year and a half of Ms. Nelson's employment with Dr. Knight, he frequently made comments to her about her clothes accentuating her figure. Dr. Knight testified he told Ms. Nelson if she saw his "pants bulging" she would know her clothes were too revealing. On another occasion, he texted her to say her shirt was too tight, and that it was a "good thing" she did not also wear tight pants, because then he "would get it coming and going." Dr. Knight and Ms. Nelson also began texting about personal matters outside the workplace, even discussing their sex lives. On one occasion, when Ms. Nelson complained about infrequent sexual encounters with her husband, Dr. Knight responded, "[T]hat's like having a Lamborghini in the garage and never driving it." Dr. Knight once asked Ms. Nelson by text how often she experienced an orgasm. Ms. Nelson did not object to these types of comments, nor did she ask Dr. Knight to discontinue the comments or texts.

Interestingly, Dr. Knight's wife was also an employee at the dental practice. She became aware of the suggestive texting, confronted Dr. Knight, and demanded he terminate Ms. Nelson, calling her a "big threat" to the marriage. Dr. Knight terminated Ms. Nelson's employment in the presence of his church pastor. He stated their relationship had become a detriment to his family and provided her one month's severance pay. Dr. Knight later explained to Ms. Nelson's husband that while Ms. Nelson was "the best dental assistant" he ever had, he feared he would try to have an affair with her if she remained his employee. Dr. Knight replaced Ms. Nelson with another female. Ms. Nelson sued for sex discrimination in Iowa State Court under the Iowa Code.

The district court granted summary judgment to Dr. Knight, holding "Ms. Nelson was fired not because of her gender but because she was a threat to the marriage of Dr. Knight." Ms. Nelson appealed, arguing she clearly would not have been terminated "but for" her gender. Dr. Knight responded he does not discriminate against women – in fact, all his employees are women. Rather, the potentially destructive nature of their individual relationship is what prompted his decision to terminate her employment. Ms. Nelson responded that neither the relationship nor the threat would exist but for her gender, making this a clear case of discrimination against her on the basis of her gender.

The all-male Iowa Supreme Court upheld the ruling, relying almost entirely on federal precedent interpreting Title VII of the United States Civil Rights Act. The Court acknowledged Ms. Nelson would not have been fired if she were a man. However, she was not fired because she is a woman. This, according to the Court, was the ultimate dispositive fact. The Court noted, "[T]he civil rights laws seek to insure that employees are treated the same regardless of their sex or other protected status… Dr. Knight's unfair decision to terminate Nelson… does not jeopardize that goal. This is illustrated by the fact that Dr. Knight hired a female replacement for Nelson." The Court ultimately held Ms. Nelson's firing was an "isolated employment action based upon Dr. Knight's individual feelings and emotions" toward Ms. Nelson, and therefore, the employment action was lawful.

The holding is consistent with a formidable body of federal case law from multiple circuits. Specifically, the Court cited *Tenge v. Phillips Modern Ag Co.*, 446 F.3d 903 (8th Cir. 2006), another case involving a woman who was fired because the employer's wife was threatened by the continued employment. However, in *Tenge*, the fired employee admitted to pinching the employer's rear and writing "notes of a sexual or intimate nature" to him. The Court in *Tenge* ruled there was no sex discrimination, but specifically noted its holding was not intended to address a situation where the employee had not engaged in sexually suggestive conduct. The Court in *Nelson* acknowledged this open question and turned to the case of *Platner v. Cash & Thomas Contractors, Inc.* (11th Cir. 1990) as more analogous. In *Platner*, a woman was fired by a business owner simply because the wife of the business owner's son became "extremely jealous" of her. The employee's conduct was "basically blameless" in the Court's estimation, but the Court still held her termination was lawful.

In her most compelling argument, Ms. Nelson contended that failing to extend legal protection to women like her in the workplace would run counter to the spirit and intent of civil rights laws. The result would be to allow employers to repeatedly justify adverse employment actions against persons of a particular gender by claiming their spouses perceived an attraction, or that they feared they may be tempted to make an advance on an employee. The Court acknowledged this is a "legitimate concern," but noted such cases could be distinguished. Evidence of repeated episodes of these types of terminations could lead a Court to infer that gender, not a personal relationship, is the motivating factor in a termination.

In *Nelson*, the Iowa Supreme Court explained its reasoning and cited the established law upon which the holding was based. Nevertheless, the ruling garnered attention from national news outlets and prompted widespread outrage. Ms. Nelson's firing struck a chord with many as unfair treatment of a woman in a situation familiar to many women – being the target of unsolicited sexual interest from an older, married boss. After all, the record showed an affair did not take place. Ms. Nelson, while certainly aware of Dr. Knight's attraction to her, did nothing overt to encourage Dr. Knight's attraction, yet she was fired because his attraction persisted. The Iowa Supreme Court seemingly anticipated this reaction and pointed out, "the issue before us is not whether a jury could find that Dr. Knight treated Nelson badly. We are asked to decide only if a genuine fact issue exists as to whether Dr. Knight engaged in unlawful gender discrimination when he fired Nelson at the request of his wife." In so holding, the Court emphasized the legal principle that attractiveness is not a legally protected trait.

Initially, one might question why Ms. Nelson did not proceed under a cause of action for sexual harassment. Certainly, texts and comments of this nature are common allegations in sexual harassment cases, particularly in hostile work environment claims. Communications as explicit as those in this case are usually quite sufficient to create a question of fact as to whether harassment occurred. However, a hostile work environment sexual harassment claim requires a showing that the employee actually perceived the behavior as hostile or abusive – that simply does not appear to be the case here. Ms. Nelson never objected to Dr. Knight's comments or texts or asked him to stop.

Similarly, Ms. Nelson did not make a claim for quid pro quo harassment or retaliatory discharge, presumably because she was never asked to actually participate in an affair, and she never refused. The facts were not present to sustain either cause of action. Therefore, the case was brought merely as a sex discrimination claim. The Court acknowledged Ms. Nelson's predicament, and conceded Ms. Nelson would not have been fired had she been a man. However, the Court declined to extend legal protection under civil rights laws on that basis.

Nelson clarifies that an employee who is terminated simply because she (or he) is the object of an employer's romantic affection enjoys no protection under today's civil rights laws. Until Congress or individual state legislatures pass new laws, future Courts are unlikely to hold differently. Practitioners should take note of this line of cases and the distinction drawn between actual discrimination and adverse employment actions based upon purely personal relationships. However, the limitations to this defense should also be noted. *Nelson* made it clear an employer may fire an employee to appease a spouse or avoid sexual harassment, but also pointed out that repeated episodes of such terminations could comprise evidence of gender discrimination. Before asserting this defense, defense counsel should conduct a thorough investigation into previous terminations by an employer. Historical information is certain to be sought in discovery by a Plaintiff in an effort to get the case before a jury. As the overall reaction to the *Nelson* ruling demonstrates, the Court of public opinion may not be a favorable venue for the employer.

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