



## **Supervisor Constructively Discharged For Protecting “Ugly” Subordinate**

In *Yanowitz v. L’Oreal*, a California Court of Appeal ruled on March 7 that a supervisor at a cosmetics conglomerate may pursue her claim for retaliation arising out of a refusal to carry out her manager’s instruction to terminate a clerk who was not “good-looking enough.” Elysa Yanowitz alleged that her manager, Jack Wiswall, ordered her to fire a female sales clerk on the ground that she “was not good-looking enough.” According to Yanowitz, Wiswall preferred fair-skinned blondes and the sales clerk had dark skin. Wiswall purportedly told Yanowitz to “get me somebody hot.” After Yanowitz refused, Wiswall frequently criticized her performance (for the first time in her seventeen years with the company) and made her life miserable. Yanowitz went on stress leave, then left the company and sued for retaliation in violation of the California Fair Employment and Housing Act (“FEHA”). The court noted that the FEHA does not protect against discrimination on account of physical appearance. Conversely, the law does not allow an employer to insist on attractive female employees while not imposing the same requirement on men. In holding that Yanowitz was entitled to a jury trial of her claim for constructive discharge, the court concluded that Wiswall’s insistence on hiring only “hot” female clerks discriminated on the basis of sex. This case reminds employers they should not impose heightened appearance standards for female applicants - even in an image-conscious industry like cosmetics.

## **Attention Deficit Diagnosis Did Not Prohibit Termination For Threatening Co-Workers**

In *Calef v. The Gillette Company*, the federal First Circuit Court of Appeals ruled that an employer properly discharged an employee for threatening a supervisor, notwithstanding a prior diagnosis of Attention Deficit Disorder (“ADD”). Fred Calef worked for Gillette as a production mechanic in Massachusetts. He had a history of altercations with co-workers. After the company placed him on final warning for threatening to punch another employee in the face, he was diagnosed with ADD, given counseling, medication, and over forty days of FMLA leave. Upon his return to work, Calef became angry about having to work a Sunday shift. When the supervisor asked Calef why he was upset, Calef repeatedly yelled “you know what you did to me,” and “you never tell me anything.” Calef continued to behave so irrationally that the supervisor feared for his own physical safety. After his termination, Calef sued Gillette for violation of the Americans with Disabilities Act (“ADA”). The court dismissed the lawsuit because Calef was not a “qualified employee” under the ADA, explaining that where an employee’s unacceptable behavior threatens the safety of others, the law does not require that he be retained, even if the behavior stems from a mental disability. Accordingly, notwithstanding an employee’s mental disability, employers must balance the equally important public policy of ensuring workplace safety.

## **Stockton, CA Steel Plant Pays \$1.1 Million To Settle Muslims’ Harassment Claims**

In *EEOC v. Herrick Corporation d/b/a Stockton Steel*, the EEOC obtained a \$1.1 million settlement on behalf of four Pakistani-American employees who alleged they were repeatedly harassed by co-workers and supervisors on account of their Muslim religion and national origin. In addition to monetary relief, the company entered into a consent decree that required personnel policy changes and training of employees. Given the current war against Iraq, employers must prevent harassment of employees of Middle Eastern national origin and/or adherents of the Muslim religion.

## **Epileptic Employee Not Harassed Despite Being Called “Platehead”**

In *Shaver v. Independent Stave Company*, a federal district court in Missouri rejected a factory worker’s claim for hostile work environment in violation of the ADA. After co-workers and supervisors learned that Shaver had metal plates in his head from surgery for epilepsy, they repeatedly called him “platehead.” While characterizing such references as insulting, mean spirited and unprofessional, the court ruled that the name calling was not sufficiently severe or pervasive as to create a hostile environment that altered the terms and conditions of employment. Although Independent Stave Company successfully defended this lawsuit, to prevent such claims in the first instance, employers should put an immediate stop to harassing behavior of any kind, whether based upon a protected category or not.