Soft Tissue Modeling[1]: From Dental Technique to Dental Fantasy

Amidst the gender humiliation in countries like Saudi Arabia, which prevents women from working without their husbands' express permission and physical accompaniment, [2] nobody would presume an American state to stoop to such levels of outright sexism in the workplace. Surprisingly, however, Iowa's Supreme Court recently "ruled that bosses can fire workers they find too attractive and that such actions do not amount to unlawful [gender] discrimination." [3]

In *Nelson v. James H. Knight DDS, P.C.*, [4] the Iowa Supreme Court, which consists of all men, considered a sex discrimination claim brought against a male dentist Dr. Knight, who fired his female dental assistant Nelson for admittedly "fear[ing] he would try to have an affair with her down the road if he did not fire her." [5] In granting summary judgment in favor of the employer/dentist, the unanimous court held that, even given the admission and a plethora of evidence of his unreciprocated flirtatious misconduct, no reasonable trier of fact could find that the employer terminated the woman because of the her sex. [6]

Surprisingly, Dr. Knight never disputed that Nelson "did not do anything to get herself fired except exist as a female," [7] and the Court acknowledged that it was Knight, not the plaintiff, who engaged in misconduct. [8] In fact, Dr. Knight warned his "distracting" dental assistant Nelson that "if she saw his pants bulging," she would know her clothes were too tight that day. [9] In addition, Dr. Knight sent an unanswered text message to his "irresistabl[y] attracti[ve]" assistant asking her "how often she experienced an orgasm." [10] Indeed, the evidence revealed that Knight claimed to fire Nelson at the request of his wife, a fact which was central to the Iowa

[1] *Dental Techniques Price List*, Dental Techniques, Inc., http://www.dental-techniques.com/Dental_Techniques_pricelist_March12.pdf.
[2] al-Mohamed, Asmaa, *Saudi Women's Rights: Stuck at a Red Light*, Arabinsight.org, at 45.
[3] James B. Kelleher and Eric Beech, *Employers Can Fire Workers they Find too Sexy, Iowa Court Rules*, REUTERS, Dec. 21, 2012, at 1.
[4] No. 11-1857, 2012 WL 6652747 (Iowa Dec. 21, 2012).
[5] *Id.* at *2.
[6] *Id.* at *2 (noting that only when an employment decision is made on the basis of the employee's sex is a violation of Title VII and of Section 216.6(1)(a) of the Iowa Code implicated).
[7] *Id.* at *5.
[8] *Id.* at *2 and *5 n.3 ("Dr. Knight told [plaintiff's husband] that nothing was going on but that he feared he would try to have an affair with her down the road if he did not fire her . . . Dr. Knight disputes [that she did absolutely nothing but exist as a woman] to some extent, but for summary judgment purposes, we must assume the facts are as set forth above.").
[9] *Id.* at *1.
[10] *Nelson*, 2012 WL 6652747, at *1.

Supreme Court's determination that the plaintiff's gender was not the motivating factor in her termination! [11]

In reaching its decision, the Iowa Supreme Court considered Circuit Court authority holding that it is not gender discrimination to fire an employee with whom the employer had a consensual relationship, which triggered a wife's jealousy. [12] This case law considers what happens when an employee *uses* his or her sexual attractiveness or consensually reciprocates flirtation, in order to obtain an advantage relative to other employees. [13] There is, however, no such precedent in factual scenarios involving unwelcomed sexual advances or one-sided flirtation. In fact, courts considering consensual personal relationships in the context of sex discrimination have distinguished sexual harassment claims, because the issue there concerns "the coercive nature of the employer's acts, rather than the fact of the relationship itself." [14] Nonetheless, the Iowa Supreme Court concluded it was lawful to terminate an employee who has neither initiated, nor reciprocated any of the employer's flirtatious misconduct, by the mere fact that the employer in his own mind views her as an irresistible attraction. [15] The Court rationalized its decision that the employer chose to protect his familial relationship and, as a consequence, the plaintiff's gender was not the determinative factor in her termination.

Title VII sex discrimination claims have raised several difficult issues stemming from what it means to suffer an adverse and discriminatory employment action "because of sex." The Court's decision centered primarily around the fact that Dr. Knight fired Nelson due to her threat

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[11] *Id.*

[12] *Tenge v. Phillips Modern Ag. Co.*, 446 F.3d 903, 905-06 (8th Cir. 2006) (finding in favor of employer, where former employee admitted to her own initiated sexual behavior with the boss, once pinching his rear end and other times leaving notes of a sexual nature in locations where other employees could see them); *Platner v. Cash & Thomas Contractors, Inc.*, 908 F.2d 902, 903-05 (11th Cir. 1990) ("terminating an employee based on the employee's consensual sexual conduct does not violate Title VII absent allegation that the conduct stemmed from unwelcome sexual advances . . .").

[13] *See e.g., DeCintio v. Westchester Cnty. Med. Ctr.*, 807 F.2d 304, 308 (2d Cir. 1986) (finding a department head's promotion of a female applicant with whom he was romantically involved not violative of other male employees' Title VII rights, since the prejudice did not stem "because of their status as males; rather, they were discriminated against because [the department head] preferred his paramour."); *see also Preston v. Wisconsin Health Fund*, 397 F.3d 539, 541 (7th Cir. 2005) (finding a supervisor not in violation of Title VII's prohibition of sex discrimination, where he replaced a male employee with a female with whom he was rumored to be romantically involved, because his romantically motivated favoritism was not otherwise based on the belief that women were more qualified than men for the job).

[14] *Id.* at 307.

[15] *Nelson*, 2012 WL 6652747,at *5; *see also Jura v. Cnty. of Maui*, No. 11-00338, 2012 U.S. Dist. LEXIS 182379, at *9 (agreeing with the *Nelson* court that "[e]ven though the employee would not have been an irresistible attraction but for being a woman, the court said a decision based on personal relations was distinguishable from a decision based on gender itself.").

to his marriage, not due to her sex as a woman. [16] There is no avoiding, however, that apart from the fact that plaintiff did not claim sexual harassment, [17] Dr. Knight's sexual discomfort (or comfort, depending on how one views it) resulting from his *own* sexual advances, was gender-based. But for Nelson's status as a woman, an attractive one nonetheless, Dr. Knight would not have warned her of his potential pant-fitting issues or confronted her about her lack thereof. [18] In other words, it was her *feminine* attractiveness which he feared would tempt him and which his wife perceived as a threat to their heterosexual marriage. Therefore, his act of terminating Nelson *because of* his gender-based attraction, and *because of* his wife's gender-based jealousy, was also itself gender-based.

By refusing to hold the dentist liable when he fired a woman due only to his own sexual fantasies about her, and not based on any employee misconduct, the Iowa Supreme Court now permits employers to justify sex discrimination on pretexts of sexual attraction. [19] As a reminder, it is established law that only *consensual* workplace relationships, not employer-initiated fantasies, pass muster under Title VII when they motivate termination. [20]

This decision contradicts a number of United States Supreme Court decisions, which found gender discrimination where an employer gives grooming advice to his female associate, such as "dress more femininely, wear make-up, have her hair styled, and wear jewelry" to better

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[16] *Id*. at *3.

[17] *Id*. at *2 ("Nelson does not contend that her employer committed sexual harassment"); Nelson probably would have succeeded if she asserted sexual harassment, depending on how good of a case she could have made that Doctor Knight's advances were "unwelcome".

[18] Had Nelson been a man, assuming Dr. Knight stayed true to his asserted sexuality, he would not have acted the way that he actually did with Nelson. *See Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998) ("Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at *discrimination ... because of ... sex*." In addition, the Court concluded that while same-sex harassment is "not the principal evil Congress was concerned with when it enacted Title VII", but it is a "reasonably comparable evil" that the statute was designed to reach) (emphasis in original) (internal quotations omitted) (internal citations omitted).

[19] It is arguable, also, that had the dental assistant been a man and the dentist had a homosexual attraction to him, ultimately firing him for similar reasons under similar facts, that he would have engaged in sex discrimination. *See Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) (holding same-sex harassment is "not the principal evil Congress was concerned with when it enacted Title VII", but it is a "reasonably comparable evil" that the statute was designed to reach).

[20] *Nelson*, 2012 WL 6652747, at *4 (citing *Tenge v. Phillips Modern Ag. Co.*, 446 F.3d 903, 909 (8th Cir. 2006); The Court obviously did not review the evidentiary record closely enough, since it said it would have found differently if Dr. Knight found several of his female employees too attractive, since only then might it be able to "infer that gender and not the relationship was a motivating factor." *Id.* at *6. There was no relationship. Dr. Nelson admitted that is was his for his own good that he should not see her in tight clothes, for *he* would initiate an affair with her if he did not fire her. The Court cited not a single statement or action by Nelson as being anything more than "relatively innocuous". *Id.* at *1.

her chances at making partner. [21] This type of advice requires a female employee to conform to a gender-based stereotype that would impede her ability to perform her job; thus, such sex-differentiated dress code is discrimination. [22] It is therefore frustrating to discover that Dr. Knight suggested to Nelson that she "put on her lab coat", in conjunction with his more explicit innuendoes. [23] It would be interesting to see whether Dr. Knight himself wore a lab coat or ever required any potential male employees to do so. [24] But, seeing as Nelson was expected to know when Dr. Knight's pants were "bulging," [25] it is unlikely that Dr. Knight also required himself to wear a long white lab coat covering his unmentionables.

For the foregoing reasons, I would like to see Iowa to adopt the Eighth Circuit's precedent governing sex discrimination involving consensual relationships. Once again, that law states the following:

> [A]bsent claims of coercion or widespread sexual favoritism, where an employee engages in consensual sexual conduct with a[n employer] and an employment decision is based on this conduct, Title VII is not implicated because any benefits of the relationship are due to the sexual conduct, rather than the gender, of the employee. [26]

I would additionally like to see the Supreme Court review this matter of first impression and adopt a rule to define a "consensual" relationship in terms of lawful termination. At one point in the case it came out that Nelson would respond to Dr. Knight's text, but only about "relatively innocuous" matters. [27] Dr. Knight, on the other hand, should have recognized his supervisory position and acted more professionally. [28] It is only a matter of common sense that courts hold a person accountable for his or her own misconduct and not shove it onto another because of his or her own physical interest in the other.

According to an ABC News/Washington Post poll, one in four women in today's workforce have experienced sexual harassment. [29] Of those women, a shocking 41% report such

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[21] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989).
[22] *Id.*
[23] *Nelson*, 2012 WL 6652747, at *1.
[24] *SeeCarroll v. Talman Fed. Savings & Loan Ass'n*, 604 F.2d 1028 (7th Cir. 1979) (finding gender discrimination to require female employees to wear uniforms and men only to wear business attire).
[25] *Supra* text accompanying note 9.
[26] *Tenge v. Phillips Modern Ag.Co.*, 446 F.3d 903, 909 (8th Cir. 2006).
[27] *Nelson*, 2012 WL 6652747, at *1.
[28] Alan M. Kaplan, *Termination for being too attractive not sex discrimination*, LEXOLOGY, Jan. 7, 2012, at 1.
[29] Gary Langer, One in Four U.S. Women Reports Workplace Harassment, ABC NEWS, Nov. 16, 20111, at 1.

workplace harassment to their employer.[30] The problem arises when the harassment comes from the employer him or herself. An employee's only alternative to ignoring her boss' inappropriate behavior in the hopes that he will stop, is to risk her job by *insisting* that he stop. Of course, if she were fired as a result of such request, she might have a different and more meritorious wrongful discharge claim. But, the result is the same – the employee is now unemployed and must surmount the hurdles of litigation. It is a professional woman's right to go about her job as she sees fit, in compliance with workplace rules which are consistent with public policy. It is *not* her boss' right to require her to follow his own personal rules, which clearly contradict public policy, like that of Iowa's public policy exception to specific employer sexual motives for discharge.[31]

Jealous wives are prevalent these days[32] and undoubtedly, more men would fire a lady if permitted, in order to save themselves from never-ending nights of nagging. But to allow employers to do so will fall more harshly on women simply trying to keep their jobs in an already struggling economy.

[30] *Id.*

[31] *Application of the Public Policy Exception to Specific Employer Motives for Discharge: Refusing sexual advances*, 6 Emp. Discrim. Coord. § 1:61.

[32] *See e.g.*, ("[I]t is in fact [statistically] possible to predict that jealousy will strike people who are preoccupied with keeping a relationship exclusive and isolated. . . For women. . . jealousy is more likely when the relationship far outweighs any other aspect of life in importance. Although women's roles continue to change, Dr. White says that men may still find it easier to develop alternative ways of supporting their self-esteem. Though a man may be dependent on his partner, he is not as likely to depend as much on the structure of marriage or a relationship as most woman might.")