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North Dakota
EMPLOYMENT LAW LETTER

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What's Inside

What's Online

Podcast
"Employee value equation" for performance management
ow.ly/ZqoO30c06if

Strategic HR
Employee network groups can help you improve retention
ow.ly/QsaG30bPGmp

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AGE DISCRIMINATION

Quick termination and consistent rationale spell victory in age case

The U.S. 8th Circuit Court of Appeals (whose rulings apply to all North Dakota employers) recently affirmed the dismissal of an age discrimination claim because, among other things, the terminated employee was with the company for a relatively short time and the employer's rationale for terminating him was consistent throughout the process.

Background

In 2011, 54-year-old Thomas Nash enrolled in the nanoscience technology program at Dakota County Technical College in Rosemount, Minnesota. He needed to complete an internship in order to finish his degree, so he sought placement with Optomec Inc., a manufacturer of 3D printing systems. Optomec's vice president of engineering, John Lees, who was 49 years old at the time, offered Nash a full-time paid internship for the summer and fall of 2013.

Nash's duties included taking measurements, recording data, and operating and maintaining lab equipment. He worked alongside three other interns, all of whom were engineering students at the University of Minnesota in their early 20s. According to Nash, Lees exhibited a preference for the younger interns, sending one on company trips and paying another $2 more per hour than Nash earned.

Following his internship with Optomec, Nash described his experience positively in postinternship reports to his school. Lees' evaluation of Nash, on the other hand, was rather unenthusiastic. He noted that Nash struggled with tasks involving physical skill and dexterity, as well as troubleshooting systems. He also stated that previous interns had "more learning potential."

Upon earning his associate degree, Nash approached Optomec about a permanent position. Despite concerns about his performance as an intern, Lees offered him a full-time position starting in January 2014. As Optomec's sole full-time lab technician, Nash worked on several projects over the following months. Still, he believed that Lees continued to exhibit a preference for the younger interns.

Meanwhile, Optomec was becoming concerned about Nash's performance. His superiors reported that he continued to exhibit many of the same problems that had dogged him during his internship. Lees stated that Nash's struggles with troubleshooting and critical thinking were amplified by the fact that the business was growing. Eventually, Lees changed his view of what he wanted from lab technicians, explaining: "[The position was] a way to bring people into the technology"

with the expectation that they would "grow and progress beyond that point."

Lees fired Nash on June 6, 2014, telling him that his termination "was not performance[-]related." Nash exercised his right under Minnesota law to request a letter from Optomec explaining why he was fired. In its response, Optomec noted his performance was "satisfactory in terms of performing more menial tasks" but explained that he did "not possess the full breadth of skills required to successfully meet the challenges required" by the position going forward.

Nash sued Optomec for age discrimination under the Minnesota Human Rights Act. However, the district court granted summary judgment (early dismissal) in favor of Optomec, finding Nash failed to meet his initial burden of establishing an inference that he had been a victim of discrimination. Nash appealed to the 8th Circuit.

8th Circuit's decision

Nash argued, among other things, that Optomec's allegedly preferential treatment of the younger interns and the fact that the company may have had the interns take on his work temporarily in the wake of his departure were sufficient to support an inference of age discrimination. The 8th Circuit disagreed, noting that even if Optomec did temporarily assign his work to the interns, that wasn't enough to support a claim for age discrimination. Instead, the relevant inquiry was whether Nash's *permanent* replacement was younger than him.

Nash also claimed that Optomec's shifting explanations for his termination reflected a discriminatory motive, but the 8th Circuit again disagreed. The court explained that to be indicative of a possible improper motive, a shift in the employer's explanation for the termination must be "substantial." It then characterized the difference between Lees' initial statement about the termination to Nash and the explanation that was given in the termination letter as consistent with Optomec's overall rationale for firing him.

The court observed that Optomec had harbored reservations about Nash's abilities since his time as an intern. Nonetheless, Lees hired him to give him an opportunity to develop the skills necessary to perform the job going forward, particularly with regard to the demands being placed on the company by its growing profile and customer base. Nash had manifestly failed to do that.

The 8th Circuit further ruled that Nash's case was undermined by two key factors. First, the court found it significant that he was hired and fired within a relatively small window of time, concluding "it is unlikely a supervisor would hire an older employee and then discriminate on the basis of age" only a short time later. Second, the court found it unreasonable to suggest that Lees, who is only five years younger than Nash, would discriminate against him based on his age.

Accordingly, the appeals court affirmed the lower court's ruling and dismissed the case. *Nash v. Optomec, Inc.*, No. 16-2186, 2017 U.S. App. LEXIS 3684, at *8 (8th Cir., Mar. 1, 2017).

Bottom line

This case underlines the importance of consistency when you articulate (and document) the reasons for a termination. Here, Optomec maintained throughout the case that although Nash's skill set was enough to qualify him for the job at the most basic level, his failure to further develop his skills going forward made him a poor fit for the job, especially given the rapid growth the company was experiencing at the time. ✤

WHISTLEBLOWERS

Don the whistleblower's hat: a strategy for avoiding retaliation claims

With retaliation claims again topping the list of charges filed most frequently with the Equal Employment Opportunity Commission (EEOC) and whistleblower claims on the rise, employers can learn a great deal by better understanding the psychology of a whistleblower, says attorney Brad Cave of Holland & Hart LLP in Cheyenne, Wyoming, and editor of Wyoming Employment Law Letter. If employers can "put on the whistleblower's hat," he says, they may be able to reduce the risk of a retaliation suit significantly.

Cave's suggestions came during the recent annual meeting of the Employers Counsel Network (ECN) in Nashville, Tennessee. Lisa Edison-Smith, Vanessa Lystad, and KrisAnn Norby-Jahner, editors of North Dakota Employment Law Letter, are members of ECN, a network of lawyers from all 50 states, Washington, D.C., and Canada who write BLR's state employment law newsletters. Cave was joined in the presentation by Dr. Ken Broda-Bahm, senior litigation consultant at Persuasion Strategies.

What's in a whistleblower's mind?

Whistleblowers face a dilemma. They think they're right and feel morally compelled to do something. On the other hand, by making a complaint, they know they're placing themselves in a position of significant risk. They risk their jobs, relationships, and career futures. Managers face some risks, too, but they are largely in the managers' control.

Retaliation continues to be the most prevalent claim—and recoveries in 2016 topped $182 million.

There's an annoying aspect that some employers have experienced—the situation in which they win the discrimination claim but lose the retaliation claim.

Whistleblowers have two things in their minds. First, they complained about something, and second, something bad happened to them. They don't care about legal definitions of retaliation or about how much time elapsed between the reporting and the bad thing.

Faced with a complaint, employers tend to say, "They were making it up." But that's not usually the case; the employee generally has a "good-faith belief" that he is right. And that's all that's required legally. The complainer doesn't have to be right about the complaint.

Cultivate culture of criticism that leads to loyalty

Employers already understand the need for policies that don't merely prohibit discrimination but also prohibit retaliation and the adverse treatment of whistleblowers. But it isn't enough to just *inform* workers that they are protected from retaliation. Instead, companies should create a culture that supports internal criticism across the spectrum of issues, large and small. Whistleblowing can either increase cooperation and reduce selfishness within the group or increase dissent and denigration. The difference comes down to group culture.

Organizations looking to reduce the threat of retaliation lawsuits should consider creating a culture that welcomes criticism. The thought is that if you encourage employees to blow the whistle internally and your company views dissent as a good thing (i.e., it makes the company better), loyalty is enhanced, and whistleblowing to an outside entity such as the EEOC becomes less likely.

Part of that effort should include strong, well-publicized policies that encourage internal reporting of potential violations or wrongdoing. But it should also include training supervisors on how to welcome criticism and avoid retaliation toward

AGENCY ACTION

USCIS announces efforts against H-1B abuse. U.S. Citizenship and Immigration Services (USCIS) in April 2017 announced stepped-up measures to fight H-1B visa fraud and abuse. Also, on April 7, the agency announced it had reached the congressionally mandated 65,000 H-1B visa cap for fiscal year 2018. It also announced it had received a sufficient number of H-1B petitions to meet the 20,000-visa U.S. advanced degree exemption, also known as the master's cap. The antifraud measures will target cases in which USCIS can't validate the employer's basic business information through commercially available data, H-1B-dependent employers, and employers petitioning for H-1B workers who work off-site at another organization's location. The agency said targeted site visits will allow it to focus resources where fraud and abuse of the H-1B program may be more likely to occur.

EEOC examines state of current, future workforce. The Equal Employment Opportunity Commission (EEOC) heard from workforce experts about challenges posed by a skills gap and lack of opportunities during a public meeting in April. "A thorough understanding of today's workforce, the employment opportunities available, the challenges in the job market—all are critical to our work in the EEOC," Acting Chair Victoria A. Lipnic said after the meeting. "Job opportunities must not be denied to anyone for discriminatory reasons. And at the end of our work, discrimination must be remedied with employment opportunity." Speakers at the meeting discussed the changing nature of work creating a gap between jobseekers and vacancies, the impact of technology, and the need to remove barriers for people with disabilities.

OSHA delays enforcing crystalline silica standard. The Occupational Safety and Health Administration (OSHA) announced in April that it would delay enforcement of the crystalline silica standard that applies to the construction industry. The delay will allow time to conduct additional outreach and provide educational materials and guidance for employers. The agency said it wants additional guidance because of unique requirements in the construction standard. Originally scheduled to begin June 23, enforcement is now set to begin September 23. OSHA said it expects employers in the construction industry to continue to take steps either to come into compliance with the new permissible exposure limit or to implement specific dust controls for certain operations as provided in Table 1 of the standard. Construction employers also should continue to prepare to implement the standard's other requirements, including exposure assessment, medical surveillance, and employee training. ✤

WORKPLACE TRENDS

Study shows impact of college majors on gender pay gap. An analysis from Glassdoor shows how men's and women's college majors contribute to the average gender pay gap in the early stages of their careers. The study, "The Pipeline Problem: How College Majors Contribute to the Gender Pay Gap," shows how the way men and women tend to sort into different majors affects pay within the first five years after graduation. The analysis shows an 11.5% average pay gap among new grads in the early years of their careers. Even with the same degree, men and women often sort into different jobs that pay differently. For example, the analysis found that the major leading to the largest average pay gap is healthcare administration, with a 22% pay gap. The three most common healthcare administration jobs men take after college are implementation consultant, quality specialist, and data consultant. The three most common jobs women take after earning the same degree are the lower-paying administrative assistant, customer care representative, and intern positions.

Researchers find gig economy a threat to employers. A study from MetLife finds that 51% of employees surveyed say they are interested in contract or freelance work for more flexible hours, the ability to work from home, and project variety instead of working a full-time salaried job, which may not offer such perks. The insurance giant's 15th annual U.S. Employee Benefit Trends Study finds that freelance work appeals to Millennials most, with 64% of the generation interested, followed by Gen X with 52%, and Baby Boomers with 41%. Employers agree that the gig economy is affecting the workplace, with 59% saying the increase in temporary jobs will affect the workplace in the next three to five years.

Survey finds most Americans support paid family and medical leave. A study from the Pew Research Center released in March shows wide support for paid leave for employees, with most supporters saying employers rather than the federal or state government should cover the costs. The public is sharply divided, however, over whether the government should require employers to provide this benefit. The survey found that 48% of respondents said that employers should be able to decide for themselves whether to offer paid leave, 51% said the federal government should require employers to provide paid leave, and 1% had no answer. The research finds that relatively few respondents considered expanding paid leave as a top policy priority. The survey found that 82% of respondents said mothers should have paid maternity leave, while 69% supported paid paternity leave. ✤

subordinates who speak up, in addition to conveying other messages that highlight the value of internal constructive criticism.

Make whistleblowing 'less noble, more normal'

If an employee's whistleblower or retaliation claim heads to court, you might benefit from evaluating your complex feelings toward the whistleblower. You may not want to explicitly play the loyalty card because blaming the employee for breaking ranks may seem to reinforce his argument that your company had a retaliatory motive. Instead, seek to normalize the act of whistleblowing.

If your company has embraced a culture of criticism, you should be able to point to several features of your policies and culture that don't just allow whistleblowing but positively encourage it. The ability to prove that such a culture exists permits you to suggest that whistleblowing isn't a uniquely noble act on the employee's part but instead is something you expect of all your employees. The fact that a claim was made means you need to take it seriously, but it doesn't mean you retaliated against the employee.

Ultimately, the complexity of our views of whistleblowers is a reminder that employment decisions and court cases aren't just about claims, evidence, and the law. They are also about perceptions and a story and how each of the parties fits within that story's moral frame.

Questions your company should ask

Finally, ask yourselves these questions:

- Are we clear and honest about what we want?
- Are we encouraging "dissensus"? (When discussion, criticism, and reporting are part of your job and part of your culture, it's harder to get worked up.)
- Is whistleblowing normalized?
- Are we aiming to keep it nonpersonal?

- Are we consistent?
- Do we follow through? (Employees need to see that the complaint process is followed).
- Do we publish outcomes ("We investigated and corrected" or "we found no violation but see the need for more training.")
- Do we properly implement whistleblower discipline? (Yes, you can impose discipline on someone who is a whistleblower, but only with care.) ✤

EMPLOYER LIABILITY

Terminated truck driver fails to provide evidence of city's discrimination

On November 14, 2016, the 8th Circuit affirmed a district court's decision to grant summary judgment (dismissal without a trial) on claims of race and age discrimination filed by an employee who was fired for insubordination, finding the employee failed to establish a prima facie (minimally sufficient) case of discrimination.

Driven out of his job

Johnny Lee Grant, a 59-year-old African-American man, worked as an at-will employee for more than 27 years in the Blytheville (Arkansas) Street Department. Before his termination, he was responsible for driving a street department truck with a three-person crew assigned to cut weeds and pick up trash. After the unexpected death and retirement of the other two crew members, Grant was the only employee assigned to the truck.

On September 26, 2012, Grant's immediate supervisor, Roy Simmons, told him that a new employee, Steven Walker, would be driving the truck. Walker, a 45-year-old African-American man, had transferred from another city department. Grant's title, work hours, and pay would remain the same, but he would no longer drive the truck.

Grant was upset by the reassignment, so he and Simmons met with the city's public works director to discuss the reassignment. Grant told the director that he wouldn't work unless he was reassigned to his job as a truck driver. The director rejected his request to continue to drive the truck and ordered him to perform his new assignment. When he refused, the city fired him.

Grant sued the city for race and age discrimination under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act (ADEA). The federal district court granted summary judgment to the city on both claims because Grant failed to establish that its reason for firing him—his insubordination—was pretextual, or an excuse for discrimination.

Court curbs truck driver's claim

On appeal to the 8th Circuit, the city conceded that Grant had established (1) he is a member of two protected classes (i.e., he is an African-American man over the age of 40), (2) he met the city's legitimate employment expectations, and (3) he suffered an adverse employment action (i.e., he was fired). Therefore, the only question left for the court to address was whether he offered sufficient factual evidence to establish that the circumstances of his termination "gave rise to an inference of discrimination based on age or race."

Ultimately, the court found that "Grant failed to substantiate his claims of race and age discrimination with sufficient probative evidence to permit a rational trier of fact to find in his favor." In other words, he didn't present adequate evidence of discrimination to allow his claim to proceed.

No similarly situated employees. The court began its inquiry into whether Grant suffered discrimination by examining the circumstances of other terminated employees who were "similarly situated in all relevant respects." Specifically, the court looked at whether the other terminated employees were treated more favorably than Grant.

In an attempt to cite "similarly situated employees," Grant pointed to three African-American workers who were fired for not showing up to work and one white worker who was fired for walking off the job. However, the court didn't find the city discriminated against him when it compared his situation to that of the other discharged employees. In fact, the court didn't believe any of the employees was sufficiently similar to Grant to serve as a comparator.

To the contrary, the court found that Grant's evidence with regard to the four employees only bolstered the city's position because it demonstrated that both African-American and white employees were fired for misconduct. Further, the court noted that Walker, the employee who was assigned to drive Grant's truck, is also an African-American man older than 40. That fact further established the city didn't fire Grant based on his race or age.

Lack of discriminatory remarks. Next, the court examined whether Grant was subjected to discrimination through a decision maker's biased comments. However, according to the court, Grant wasn't able to provide any evidence of biased comments, and in fact, he admitted that the public works director had fired an employee for using a racial slur in the past. Moreover, he stated that he

UNION ACTIVITY

Unions speak out against OMB proposal. Unions representing government employees have spoken out in opposition to a memorandum from Director Mick Mulvaney of the federal Office of Management and Budget (OMB) calling for a reduction in the federal government's civilian workforce. "It's beyond insulting to hear OMB Director Mulvaney's characterization of this proposal as 'the coolest thing nobody's talking about,'" Lee Saunders, president of the American Federation of State, County, and Municipal Employees, said about the April 2017 memo titled "Comprehensive Plan for Reforming the Federal Government and Reducing the Civilian Workforce." "There's nothing cool about firing hard-working people who've devoted themselves to government service, or about hurting communities that depend on the services they provide," Saunders said. J. David Cox Sr., national president of the American Federation of Government Employees, said the memo contains "some good ideas and some very dangerous ideas." He favors examining whether there are too many layers of management, but he opposes more outsourcing.

Teamsters leaders discuss pension security with Trump. International Brotherhood of Teamsters General President Jim Hoffa and International Vice President John Murphy met with President Donald Trump in April, seeking support for the union's efforts to ensure pension security for Teamsters members and retirees. "It is important that President Trump understand the urgent need to address the pension crisis our nation is facing," Hoffa said. "We are pursuing efforts to establish a path to solvency for pension funds in crisis." Murphy said the union has been working to develop a legislative solution to the pension crisis. "As part of this process, it is paramount that we secure bipartisan support," Murphy said.

AFL-CIO calls "Buy America" Executive Order good first step. AFL-CIO President Richard Trumka is calling President Trump's April "Buy America" Executive Order "a good first step toward making Buy America provisions more effective and discouraging excessive waivers." But more needs to be done "to pivot the U.S. economy toward steady wage and job growth," Trumka said. "With respect to immigration, the labor movement consistently has called for reform, rather than expansion, of temporary work visa programs that make U.S. and foreign workers more vulnerable to discrimination, displacement, and exploitation. A serious look at the impact of these captive-work programs on rights, wages, and working conditions is long overdue. It's crucial that working people's experiences inform efforts to crack down on employer fraud and abuse." ✤

never heard the director say anything derogatory about African-American or elderly people.

Consistent reason for termination. Finally, the court examined whether the city followed its employment policies when it fired Grant or whether it discriminatorily altered its procedures. In the court's view, the evidence clearly established that Grant was fired for insubordination (i.e., refusing to work). And it was within the city's power to fire him for that offense because he was an at-will employee and the city's employee handbook explicitly states that potential disciplinary action includes termination. The court also noted that the city consistently listed insubordination as the reason it fired him.

Because Grant failed to offer any probative evidence of discrimination, the court concluded that summary judgment in favor of the city was proper. *Tina Grant, Administrator of the Estate of Johnny Lee Grant v. City of Blytheville, Arkansas,* 841 F.3d 767 (8th Cir., 2016).

Bottom line

Claims of discrimination based on a protected class (such as race, age, sex, marital status, or religion) can be a concern when you decide to terminate an employee. But if you can provide a nondiscriminatory reason for the termination, it will be up to the employee to demonstrate why your reason was a pretext for discrimination. This case is a great example of a situation in which an employee failed to offer concrete facts that substantiated his claims of discrimination. ✤

DISCRIMINATION

Who, what, wear: You can enforce a dress code!

Employers have the legal right to establish dress and grooming policies for their employees as long as the policy is not discriminatory. A dress code can be considered discriminatory if it treats employees in a protected class (based on gender, race, disability, or religion) differently or if it has a disproportionate impact on a protected class. But even if your dress code isn't discriminatory, you may still be required to make exceptions to accommodate an employee's disability or religious beliefs.

Dress code do's and don'ts

There are no federal laws specifically governing dress codes. You may implement guidelines you feel are appropriate for your business as long as they don't discriminate based on gender, race, religion, disability, or any other protected class. Generally, courts have found that employers may establish and enforce a dress code as long as they can provide a business justification for it and the standards don't affect one group of people more than another.

Gender. Gender-bias is the most common of dress code concerns. You may enforce a dress code that is different for men and women so long as the standards are reasonable in

the particular business environment and don't place a heavier burden on one gender. For example, requiring women to wear formal attire but allowing men to dress in casual attire is cause for concern.

The courts and the Equal Employment Opportunity Commission (EEOC) still deal with claims of gender discrimination because of dress code policies on beards, long hair, short skirts, pants, ties, and other concerns regarding clothing and grooming that affect each gender differently. Try to implement neutral policies. Instead of requiring a jacket and tie for men, use "professional business attire," which in business practice usually means suits and ties for men and business suits for women.

Additionally, be mindful of your transgender employees. The dress code should be applied to an employee who is transitioning to another gender in the same manner that it is applied to other employees of that gender. For example, if the policy requires male employees to wear a jacket and tie, then an employee transitioning to male should also be required to wear a jacket and tie.

Race. Dress codes may also violate federal civil rights if they adversely affect one race more than another. For example, a requirement that men must be clean shaven may have an adverse effect on one race more than another because of a skin condition irritated by shaving that occurs almost exclusively among African-American males. You must show that the clean-shaven requirement is related to the job and consistent with your business purpose or necessity.

Religious beliefs. Another area of concern is the conflict between dress codes and an employee's personal religious beliefs and customs. If your dress code conflicts with an employee's religious beliefs and customs, you must try to accommodate her beliefs unless it would pose an undue hardship. In this instance, an undue hardship means an accommodation that would require you to bear more than a minimum cost. That being said, the accommodation doesn't have to be the employee's preferred accommodation but must be an effective accommodation. And she must cooperate with your good-faith efforts to provide the accommodation.

Courts have found that employers have the right to prohibit long skirts and flowing robes when there can be a safety risk—such as on a manufacturing floor—and long beards and long hair in places where there are public health concerns—such as a restaurant. However, employers have been reprimanded for prohibiting yarmulkes, other religious dress, religious insignias, and religious tokens in an office environment.

For example, if an employee's religious beliefs require him to wear a token of his faith in the form of a necklace, and he is working on a manufacturing floor where the dress code—for safety reasons—prohibits the wearing of jewelry, then he may be accommodated by having to tuck the necklace into his shirt.

Disability. You must also consider making exceptions to the dress code and accommodations for employees with disabilities. For example, if an employee is required to wear orthopedic shoes, you should typically allow for this deviation, unless it would be a safety or public health concern. Again, as with religious beliefs, you aren't required to provide an accommodation if it would pose an undue hardship.

Casual dress/tattoos/piercings. When you're considering implementing a casual dress code or a policy regarding tattoos and piercings, be specific as to what isn't acceptable. You may want to prohibit items such as torn blue jeans, flip-flops, cutoff shorts (or shorts of any kind), halter tops, T-shirts with slogans or sayings, tattoos that are violent or sexually graphic, and facial or multiple piercings. However, you must continue to take care that these policies don't treat certain employees differently because of their race, gender, national origin, or religious beliefs.

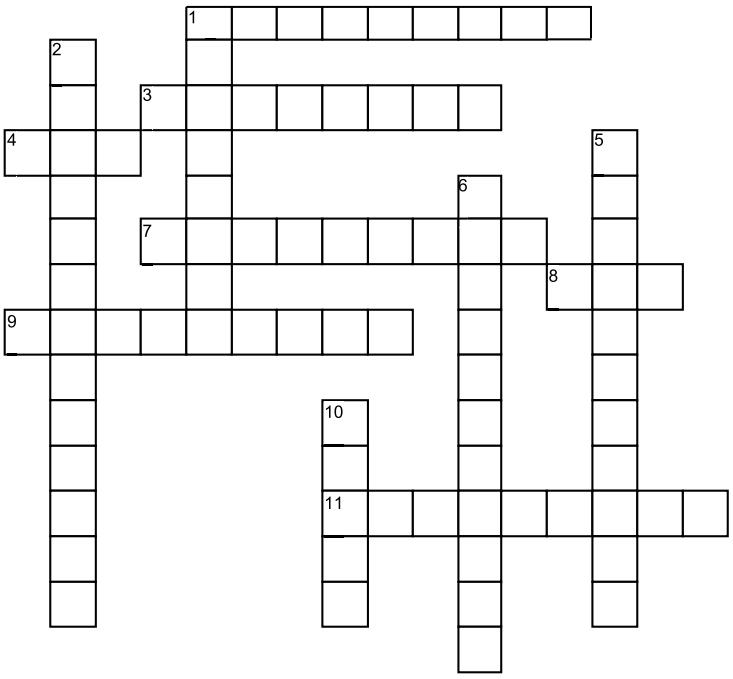
Base your policy on objective criteria, and be prepared to make reasonable exceptions and accommodations.

Bottom line

Before you draft your policy, think about the purpose behind it. Your purpose could be to protect or portray your company's image, promote morale and a productive work environment, comply with health and safety standards, or all of the above. Base your policy on objective criteria, and be prepared to make reasonable exceptions and accommodations to the dress code requirements as long as they don't present health or safety concerns. Your policy should be equally applied, clearly communicated, and consistently enforced. ✤

JUST FOR FUN

Mindteaser of the month



ACROSS

1 To establish discrimination, an employee must point to _____ _____ employees outside her protected class who were treated differently (two words). See 3 Across.

3 See 1 Across.

4 ___ is a term for freelance or contract work.

7 _____ is a term for widespread dissent.

8 Studies continue to show a significant gender pay ___ for college graduates with the same degree.

9 You may establish a dress code, but you must reasonably accommodate employees' _____ beliefs.

11 Creating a culture of internal _____ may reduce claims of retaliation and increase loyalty.

DOWN

1 Providing _____ explanations for an adverse employment action (such as termination) may indicate discrimination.

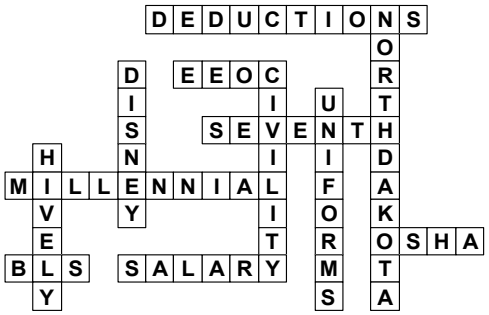
2 A _____ is someone who reports perceived unlawful conduct.

5 _____ claims are the most common type of claims filed with the EEOC.

6 Only a _____ change in an employer's explanation for termination will typically support an inference of discrimination.

10 _____ is a federal immigration agency.

Solution for May's puzzle



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