

## Appearance-Based Discrimination Not Actionable in Wisconsin

Article By:

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On January 25, 2011, the United States District Court for the Eastern District of Wisconsin decided the case of *Debra Brice v. Richard Resch and Krueger International, Inc.*, 111 FEP Cases 844 (E.D. Wis. 2011). This is a case with exceedingly unusual facts, but a fairly unremarkable holding: if you claim to suffer unlawful employment discrimination, you can file a discrimination complaint; but you cannot *also* take the same facts and go to court and call your claim something else. Your discrimination claim is your *exclusive* remedy for discrimination. Moreover, while employees **can** sue for sex/gender discrimination, they cannot **also** sue for “appearance” based discrimination, which is not separately unlawful.

In this case, Ms. Brice alleged that Richard Resch, the CEO of Krueger International, Inc. (“KI”), ordered her fired shortly after she was offered a job because he did not like her “body shape,” did not find her attractive, and would not be interested in sexually harassing her or having a romantic relationship with her.

The federal court decision addressed a variety of claims brought by Ms. Brice. First, Ms. Brice claimed that Mr. Resch and KI “tortiously interfered” with her contract with KI. The federal court dismissed this claim, noting that Ms. Brice has a remedy for the same injuries (in this case, sex discrimination). Because Ms. Brice’s allegation was that KI and Mr. Resch interfered with her contract through sex discrimination, and because the Wisconsin Fair Employment Act (through the Equal Rights Division) (“ERD”) provides a remedy for sex discrimination, Ms. Brice is required to pursue the ERD remedy, and cannot also claim that the same act constitutes “tortious interference” with her contract. The court also indicated that it would dismiss the “tortious interference” claim for a second reason: Tortious interference requires an act by a third party. Resch was an employee of KI. Resch was not a “third party” for purposes of a tortious interference claim. Accordingly, for that additional reason, her tortious interference claim was dismissed, also.

Ms. Brice also alleged “breach of contract.” The federal court dismissed the breach of contract claim for the same reason that it dismissed the tortious interference claim. The court noted that Wisconsin permits “wrongful termination” claims when an employee is terminated for a reason that “clearly contravenes the public welfare and gravely violates paramount requirements of public interest.” If the public interest Brice claims was violated was a public interest against sex discrimination, then her exclusive remedy is under the Wisconsin Fair Employment Act, and she cannot also sue for breach

of contract. There is an important caution here. The court did not dismiss or address Mr. Brice's sex discrimination claim. So far as the court held, Ms. Brice is free to pursue her sex discrimination claim.

The court also considered Ms. Brice's claim that she was the victim of "appearance based" discrimination. The court found that there is no prohibition under Wisconsin law against discrimination on the basis of appearance. **(Note: The City of Madison, Wisconsin has an ordinance making appearance-based discrimination unlawful, like sex or race discrimination, but state and federal law have no such provision.)** Ms. Brice, as noted above, is free to challenge her termination as sex discrimination. She cannot call these same facts "appearance discrimination," however, and pursue a separate claim on that theory.

In the end, this is an *extremely* odd case. To the extent the appearance-based discrimination in this case was really *sex discrimination*, then Ms. Brice had the right to pursue that claim as a sex discrimination claim through the Equal Rights Division process. She cannot also pursue the claim as a breach of contract or tortious interference with contract claim in civil court. Thus, despite its unique and disturbing facts, the *Brice* case stands for the simple proposition that the exclusivity of the ERD remedy remains intact in Wisconsin.

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