A slowly emerging form of workplace discrimination based on color or skin tone may become a trend with the growing number of complaints filed with the courts and administrative agencies. The unlawful conduct is predicated not on a person’s specific race or nationality, but on the shade of his or her skin, often involving disputes between people of the same race and among individuals who act on cultural biases based on whether a person’s skin tone is lighter or darker.

Indeed, Vice-Chair Naomi Earp of the Equal Employment Opportunity Commission told a recent meeting of the American Bar Association that “colorism” represents a potential emerging trend in workplace discrimination claims. Color claims over the past year have risen from 1,400 in fiscal year 2002 to 1,555 in fiscal year 2003, Ms. Earp reported. She noted the increase may signal a trend attributable, in part, to the changing demographics of the American workplace, as more claims of colorism are included along with charges of race discrimination – the most prevalent charge year after year – under Title VII of the 1964 Civil Rights Act.

Complaints of color discrimination go both ways, although more complaints are brought by individuals with darker skin than those with lighter skin. Ms. Earp reported the majority of charges alleging color discrimination were brought in the EEOC district offices in the cities of New York, Boston, Miami, Chicago, and Houston. She observed that color discrimination is inherent in some cultures, such as in India, Pakistan, and South America. As the United States becomes more culturally and ethnically diverse, awareness of colorism issues grow in importance, Ms. Earp emphasized.

Skin tone bias is not unique among people of color; whites also can equate darker skin with a “negative cultural stereotype.” Yet, there is a great deal of uncertainty over whether discrimination based on skin tone is even illegal, although the EEOC clearly takes the position it is.

In August, 2003, the EEOC’s Atlanta district office announced a $40,000 settlement in a “black on black” discrimination case against a franchisee of a large restaurant chain. The plaintiff was a dark skinned male waiter at the restaurant in Georgia when a light skinned black man began working as the general manager. The manager almost immediately “began harassing [the plaintiff], continuously making offensive and embarrassing comments about the dark color of [his] skin” the EEOC said in its complaint. Co-workers and some customers witnessed the harassment, the EEOC said. Despite the plaintiff’s protests, the harassment continued, and the plaintiff eventually threatened to call corporate headquarters. Shortly thereafter, he received the first of four written reprimands for “minor” offenses, EEOC said, followed by his firing. Although the plaintiff did call the restaurant chain’s hotline to complain about his treatment before being terminated, allegedly he got no response from his call.

Beyond the monetary settlement in which the employer admitted no wrongdoing, the restaurant agreed to provide anti-discrimination training to its employees and to report any complaints at its Georgia restaurants directly to EEOC. The restaurant also added a written policy prohibiting discrimination based on color.

Shortly after the restaurant case settlement, a federal judge in New York ruled that a black employee, who was fired after a darker skinned supervisor allegedly branded her a white “wannabe,” can pursue a race discrimination law suit against her employer. However, despite these and other cases in recent years, claims of color discrimination still represent a very small amount of total employment complaints.

The EEOC received 1,382 charges of color bias in 2002, representing just 2% of all agency claims. Back in 1987, the EEOC received only 459 complaints of color discrimination. By 1999, color bias charges were up to 1,304, and they have held steady ever since. Although the most typical scenario of color discrimination involves lighter skinned African Americans discriminating against darker skinned
African Americans, color bias cases also have been brought within other groups, including Native Americans and Arabs.

Color bias is difficult to categorize, and it is often viewed as another form of race discrimination. Discriminatory treatment based on skin color also may be attributed to ethnic heritage and race. For this reason, color bias complaints are seen less frequently than the more typical race discrimination claims, but as noted above, the numbers are increasing.

As with all other forms of discrimination, people may be reluctant to come forward with skin tone complaints. For one thing, many people are confused as to whether such discrimination is even against the law. However, the highly publicized restaurant chain settlement could change that.

Proving a case of skin tone discrimination may be difficult since, like the government, most employers do not maintain data on employees' skin color. So, for example, an employee would not have the statistical evidence to support a claim that a company was promoting more light skinned workers than dark skinned employees. Also, similar to age and disability factors, there is often an overlap between protected groups, making proof of discriminatory treatment based on skin color more difficult to show.

Despite the difficulties facing plaintiffs in color bias cases, there is greater judicial acceptance of such charges. Combined with a greater awareness of the issue and the growing research on the subject, the frequency of these cases is likely to continue. It is important for employers to be informed and aware of this emerging issue, particularly in areas with large concentrations of ethnic and nationality groups with whom there is associated a cultural bias based on skin tone or color. Company anti-discrimination policies should include skin tone in the list of protected categories.

We will continue to report on these and other emerging issues in employment discrimination law. In the meantime, Jackson Lewis attorneys are available to assist employers in developing and implementing workplace policies and training programs that increase employee awareness of potentially unlawful conduct and alert them to the consequences of engaging in discriminatory or harassing behavior. Our employment litigation specialists also are available to counsel and represent employers before the courts and administrative agencies in defense of charges and complaints of discrimination.

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