

AGE BEFORE BEAUTY

QUESTION: I am one of the managers for an upscale residential community exclusively for senior citizens. We have over one hundred residences, as well as several retail and service shops available in the community for the convenience of our residents.

We recently decided to add to our array of on-site amenities by opening a beauty salon. The salon will be open to the public, but based on the clientele of the other on-site service facilities, we anticipate that the customers will be predominantly senior citizens who reside here – or as we refer to it, “on campus.”

The management team is aware that our residents expect to be able to relate to the staff, and we believe that will be especially true in a salon, where the service provided is somewhat personal. Based on those concerns, we decided, before we even started interviewing salon applicants, that we would endeavor to hire a team of senior citizens to staff the new salon and that we would not hire anyone who was not nearing that “certain age.” In fact, that is how we have approached recruiting and hiring to fill all of the service positions on our campus in which employees will be interacting directly with residents.

Since our community has a reputation for catering to wealthy senior citizens, we have had many applicants who are excited about the potential for being charter members of the salon team. Our recruitment announcement indicated that we are looking for older candidates, so it has been no surprise to us that all of the applicants we’ve interviewed have been seniors -- that is, except for Jody Lynn.

Jody Lynn is 20 years old. I know how old she is because I asked her during the interview. I also asked her why a woman her age would want to work at a salon that will mainly cater to the older generation. Jody Lynn was downright excited about coming to work at the salon, explaining that she gets along very well with senior citizens because she was raised by her grandparents and remains close to them and their friends.

Jody Lynn has the necessary practical skills to work at the salon. She attended a well regarded beauty school while she was still in high school and has more than four years of experience styling hair. Before attending the beauty academy, Jody Lynn spent summers working at a very popular salon.

Today, I informed Jody Lynn that despite her obvious experience and her genuine enthusiasm to be a stylist for seniors, we decided not to hire her because of our concern that she is simply too young for our residents to accept her into the senior culture.

She left without saying much, but she thanked me for being honest with her.

A short time later, however, I received a call from one of our residents, Margaret, who is retired from a career in Human Resources. She informed me that she had heard from a friend (who turned out to be Jody Lynn's grandmother) that we had refused to hire Jody Lynn because we thought she was too young. Margaret informed me that it is against the law to refuse to hire an individual because of his or her age.

I am sure Margaret is right that in a situation when an employer perceives an applicant as too old, but I have never heard that an employer is prohibited from choosing not to hire someone because he or she is not old enough. What if a 14-year-old applies for a job in response to one of our recruiting announcements? Aren't we allowed to reject such an applicant?

ANSWER: You are correct that the law permits employers to choose not to hire 14-year-olds based on age, but in Oregon this is true only when the applicant is under eighteen years of age. Margaret is correct that applicants and employees 18 years and older are protected from employment discrimination under Oregon law.

All Oregon employers are prohibited from firing, refusing to hire, or otherwise discriminating against an individual in compensation or other terms, conditions or privileges of employment based on an individual's age when the he or she is 18 years or older. Federal law protects applicants and employees from discrimination in the workplace under the Age Discrimination in Employment Act (ADEA); however, only those 40-years-old and older are protected.

In simpler terms, age discrimination is prohibited by Oregon law whether the employer's decision is based upon its conclusion that the applicant or employee is "too young" or "too old."

There is a limited exception to the general rule that employment decisions may not be related to age. If an employer is able to demonstrate that age is reasonably necessary to the normal operation of the business the employer may have a bona fide occupational requirement (BFOR) defense to defend employment decisions based upon age. The burden of proving the BFOR is on the employer, and the BFOR defense is usually narrowly construed by courts.

For example, an employer is allowed to discriminate on the basis of age if federal laws or regulations impose age limitations for public safety reasons. An employer's BFOR defense is not justified, however, merely by customer preferences, and particularly on pre-supposed customer preferences such as what you based your recruitment of senior citizen salon applicants.

As for the situation with Jody Lynn, in light of the fact that you are now aware that your actions constitute illegal discrimination in the form of age discrimination, it would be prudent for you to consult with an employment law attorney and

immediately take appropriate corrective action. At a minimum, such action will include: revising your recruitment announcements by deleting any reference to age; offering Jody Lynn the job; and educating your workforce, including the managers responsible for interviewing, hiring and supervising employees, that age is a protected class and no employment decisions of any kind may be predicated on an individual's age as long as the individual is 18 years or older.

For more information on this and other important issues affecting Oregon employers, including seminars conducted by Boil's Technical Assistance Unit, visit our website at www.oregon.gov/boli/ta. You can also call us at 971-673-0824.