

Co-Workers' Seemingly Ageist Remarks Insufficient to Create Triable Issue of fact in ADEA Case

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During the course of an investigation into employees fraudulently submitting falsified customer service surveys, a 60 year-old employee was terminated. He subsequently filed an age-discrimination claim in Texas state court pursuant to the Texas Commission on Human Rights Act (TCHRA) and the federal Age Discrimination in Employment Act (ADEA). In support of his claim, he claimed his co-workers called him names like “old man,” “old fart,” “pops,” and “grandpa,” but he never reported this before he was terminated. The District Court granted summary judgment on behalf of the employer. The employee appealed, contending the District Court 1) used the wrong causation standard in analyzing his termination and 2) erred in granting summary judgment on his hostile work environment claim.

TCHRA is almost identical to Title VII except that it protects against age and disability discrimination. In Texas, an employee is entitled to a “presumption of discrimination” if he can meet the “minimal initial burden” of establishing a *prima facie* case. In the case at hand, the District Court did not even decide, but assumed, that the employee had a *prima facie* case. The employer then had the burden to show a legitimate nondiscriminatory reason for termination — in this case, falsified surveys. The burden then shifted to the employee to demonstrate a triable issue of material fact — e.g., to show that the proffered nondiscriminatory reason for termination was actually pretextual. The employee argued that the District Court improperly applied the “but for” standard of causation when evaluating his claim, but the Court of Appeals disagreed, finding that, actually, regardless of the test applied, the outcome would be the same, in that there was insufficient evidence to create a triable issue of material fact under the “but for” or “motivating factor” tests.

The Court of Appeals also considered the evidence proffered by the employee in support of his age discrimination claims. The evidence was circumstantial, in that he relied heavily upon the alleged comments made by his co-workers. The Court reasoned that when remarks are offered as direct evidence, there is a four-part test to determine whether they are sufficient to overcome summary judgment including if the comments are 1) age-related; 2) proximate in time to the termination; 3) made by an individual with authority over the employment

decision; and 4) related to the employment decision at issue. If remarks are offered with other discriminatory conduct, a two-part test is used: 1) discriminatory animus 2) on the part of a person that is either primarily responsible for the challenged employment action or by a person with influence or leverage over the relevant decisionmaker. Ultimately, however, the Court found that the employee could not prevail, regardless of which standard applied.

Though the employer prevailed, the employee clearly did not go down without a fight. It is a good reminder for employers to have clear policies and to provide sufficient training regarding conduct in the workplace—particularly with respect to inappropriate comments, and to remind employees (verbally and in writing) to report any such instances immediately upon occurrence.

For more information read [Ronald Reed v. Neopost USA, Inc., No. 12-10104 \(5th Cir., November 13, 2012\)](#).

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