



# Employment

## Law Briefing

Insights on Legal Issues in the Workplace



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# Were age-related remarks “stray” or evidence of age discrimination?

The issue before the Second Circuit in *Tomassi v. Insignia Financial Group* was whether an employee could maintain a case of age discrimination based on her supervisor’s relatively nonoffensive comments about her age.

## Frequent comments

A woman in her 60s managed two large housing complexes. She was assigned to a new supervisor who frequently commented on her age. She alleged that he asked her regularly if she “ever thought about retiring” and whether she was “tired of working.”

Her yearly evaluation showed that she had met or exceeded expectations in every performance category, though her supervisor noted that she needed to get more done. A few months later, complaints reached the supervisor that the manager was slow in addressing tenants’ complaints. And he claimed that she had failed to effectively and timely relocate families after an explosion in a building.

## Younger replacement

Three months later, the supervisor told the manager that the company no longer needed her services because he had hired someone with Web site experience. She alleged that he had said, “I figure that you probably didn’t want to work long hours any more, and you would be happier doing something part time.” He offered to provide her with a reference and praised her “great skills” and “great ability.”

The manager sued the company for age discrimination. The trial court found insufficient evidence to support a finding that she was fired because of her age and ruled for the company without a trial. The court attributed no significance to the supervisor’s many comments on her age, calling them “stray remarks” and noting that courts have held that stray

remarks don’t constitute “sufficient evidence to support age-discrimination claims.”

## Appeal filed

The Second Circuit first found that, because the manager satisfied the de minimis requirements of a prima facie case of age discrimination and the company proffered a different reason for her dismissal, the burden established under a previous case, *McDonnell Douglas Corp. v. Green*, didn’t shift to her. So the question was simply whether the evidence in her favor was sufficient to sustain a reasonable finding that age discrimination at least partly motivated her dismissal.



The court held that not all comments pertaining to a protected class equally tend to prove discrimination. The relevance of discrimination-related remarks doesn’t depend on their offensiveness, but rather on their tendency to show that assumptions or attitudes relating to the protected class motivated the decision maker.

Disagreeing with the trial court’s characterization of the supervisor’s remarks as “stray,” the Second Circuit found that, because the person who had decided to dismiss the manager

had made the remarks, a jury could reasonably construe them as explaining why that decision was made. The remarks could be persuasive evidence that he replaced her because he believed a younger person would attract young renters.

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## Job performance

The company attributed the supervisor's dissatisfaction not to the manager's age but to her increasingly slow and deficient job performance. He testified that he hadn't fired her because he needed someone with Web site experience — as he had told her — but rather because of her job performance.

Although the Second Circuit recognized that this explanation could be true, the trial court was required to interpret

ambiguities in the evidence in the light most favorable to the manager before it could dismiss without a trial.

The manager's evidence included the following:

- The supervisor made age-related remarks to the manager every month or so.
- He hired younger employees while seeking to attract younger renters.
- He affirmed the quality of her job performance, evidenced by the promotion, raises and praise she received throughout her employment, including praise when he fired her.
- He made age-related comments at her firing.
- He replaced her with a worker who was 38 years younger.

The Second Circuit concluded that a reasonable jury could find that age discrimination motivated the supervisor. So the court held that the manager was entitled to a trial on the merits.

## Avoid assumptions

This case demonstrates why employers shouldn't make assumptions about their employees when making employment decisions. The supervisor assumed that the manager didn't want to work long hours. Obviously, he should have talked to her before making any assumptions. 🏠

## Different facts, different outcome

Unlike *Tomassi*, the Tenth Circuit in *Saladin v. Packerware Corp.* held that an employee couldn't maintain an age-discrimination suit based on his supervisor's relatively nonoffensive comments about his age.

A factory supervisor was 65 years old when the factory changed ownership. The new management required supervisors to enforce rules more strictly and to discipline or eliminate troublemakers. The supervisor's manager demoted him for failure to abide by the new rules and for follow-up failures and poor communication skills. The supervisor retired 15 months later.

The supervisor sued the company for age discrimination. The trial court found that the facts were undisputed and the company was entitled to judgment as a matter of law.

On appeal, the supervisor alleged that his manager had occasionally addressed him as "old man" and at his demotion said he "had been on the job too long." He also claimed that his manager had at least twice asked about his retirement plans, but the court found that these inquiries were made in the context of the manager's sudden need to replace departing workers. The manager explained that, during these conversations, he had asked about the supervisor's future plans so as to gauge personnel needs. The Tenth Circuit found that these were only stray remarks not directly linked to demoting the supervisor.

# Different-decision-maker exception rescues sex-discrimination suit

**L***ettieri v. Equant Inc.* involved a sales director who claimed she had been dismissed because of her gender and in retaliation for complaining of discrimination. Let's look at the Fourth Circuit's ruling.

## A weekly commute

The sales director commuted weekly from her New York home to Virginia where she supervised a sales team. After a merger, new management reorganized her unit and created a new position to head the team.

When she applied for the new position, the senior VP who interviewed her focused on the fact that she had children at home in New York and told her he couldn't understand why a man would allow his wife to live away from home during the workweek.

*The sales director undisputedly met the first three elements to establish sexual discrimination.*

When the company hired another employee to head the team, the VP told the sales director that the key reason was that his children — unlike hers — were grown. She complained in writing to the HR department about the VP's sexist attitude and presumptions, but the company took no action.

## Verbal abuse

Later that year, the sales director complained to HR that the new head — who directly supervised her and another female middle manager — regularly screamed and cursed and referred to her and the other female subordinate as “bitches” or “stupid bitches.”

The head told the sales director of a proposed team restructuring that would reduce her supervisory responsibilities and reassign her to the New York office. Because the proposal

called for her demotion, she complained to the HR director, who informed the head and the VP of her complaint but took no other action. Within weeks of her complaint, the head significantly reduced her responsibilities.

## Women targeted

Six months later, the sales director met with the head, who commented on her attire, saying, “My, don't you look pretty in pink,” and “I like girls dressed in pink.” He then fired her and the other female subordinate. Although the company claimed that these jobs were among hundreds eliminated during the year following the merger, only these two women in the team were cut during this period.

The sales director filed suit. The trial court threw it out, ruling that the facts were undisputed and the company was entitled to judgment as a matter of law.

## 4 elements

On appeal, the Fourth Circuit noted that, to establish sexual discrimination, plaintiffs must show that:

1. They are members of a protected class,
2. They suffered adverse employment actions,
3. They were performing their job duties at a level that met their employers' legitimate expectations when the adverse employment action occurred, and
4. The company left their positions open or filled them with similarly qualified applicants outside the protected class.

The sales director undisputedly met the first three elements. Ordinarily, a plaintiff must also establish the fourth element, but *Miles v. Dell Inc.* created the “different decision-maker” exception. It allows a female plaintiff to establish a case of sexual discrimination when one manager fired her and another manager hired her female replacement. The *Miles* court explained that the second person's “hiring decision has no probative value whatsoever as to whether” the plaintiff's protected status motivated the firing decision.

## A shifting burden

So, thanks to *Miles*, the sales director didn't have to meet the fourth element (showing that someone outside her protected class replaced her). The Fourth Circuit held that she had established a sexual-discrimination case.

This shifted the burden to the company to show a nondiscriminatory firing reason. The court found that the company met this burden by presenting evidence that she was fired because her position was "not really needed" and so was eliminated to save money.

## Pretextual reasons

The burden then shifted back to the plaintiff to show that these reasons were a pretext to discriminate. She did this by showing that — about six months after she was fired — her

old job reemerged as a separate position and the company hired a man to fill it temporarily and ultimately permanently filled it with another man. So the court concluded that the company's proffered firing reason was pretextual.

The Fourth Circuit held that the facts were sufficient to allow a jury to find that the employee was replaced and that the employer's firing reason wouldn't wash. The court concluded that she had made out a prima facie case of sex discrimination even though different decisionmakers fired her and replaced her.

## Avoiding liability

This case demonstrates the importance of training supervisors to avoid the kind of conduct described here. Employers are responsible for their supervisors' conduct, so they should put procedures in place to promptly investigate complaints to avoid liability. 🏠

# Don't leave your company open to disability discrimination

**W**as a job applicant with cerebral palsy qualified to perform the essential functions of a Wal-Mart job? Was Wal-Mart's reason for not hiring him a pretext to discriminate? Those were the questions before the Eighth Circuit in *EEOC v. Wal-Mart Stores*.

## The case arises

An applicant's cerebral palsy limited his dexterity and forced him to use forearm crutches for short-distance walks and a wheelchair for longer distances. He had difficulty standing for more than 10 or 15 minutes. But he had no trouble performing daily living tasks and could lift heavy objects — even from his wheelchair.

When he applied for a Wal-Mart greeter position, he marked his availability for weekends as "negotiable." Wal-Mart declined to hire him. He wasn't hired again a few months later when he applied for a sales position in any department and indicated a

willingness to work weekends. The EEOC sued on his behalf for discrimination under the Americans with Disabilities Act (ADA).

Wal-Mart's personnel manager testified that the "main reason" for not hiring him was because he had failed to list on his application short-term jobs that she knew he had held, including working at a gas station and as a police dispatcher.



## The three-prong test

Under the burden-shifting analysis, to establish a discrimination case, applicants must meet a three-prong test. They must show that they:

1. Have an ADA-defined disability,
2. Were qualified to perform a job's essential functions — with or without reasonable accommodations, and
3. Suffered an adverse employment action because of their disabilities.

Neither side disputed that the applicant had met the first and third prongs, but Wal-Mart's expert testified that he didn't meet the second prong because he wasn't qualified to perform either job's essential functions.

The EEOC's expert witness testified that the applicant could perform the essential functions if given reasonable accommodations. Nevertheless, the trial court found that the applicant wasn't qualified to perform the jobs' essential functions and ruled for Wal-Mart without a trial.

## Essential job functions

First, the Eighth Circuit noted that, to determine whether plaintiffs are qualified to perform essential job functions, courts first consider whether they possess the requisite skills, education, certification or experience.

Second, courts consider whether they can perform the essential functions of the job despite their impairments either with or without reasonable accommodation. When employees can't perform the essential functions of a job without an accommodation, they need show only that a reasonable accommodation is possible.

The Eighth Circuit found that the applicant possessed the required skill, education and experience for the positions, and that a reasonable accommodation would enable him to perform the jobs' essential functions.

## The shifting burden

Then the burden shifted to Wal-Mart to show that it was unable to accommodate the applicant. Its expert focused on his limitations when using his crutches, not when using a wheelchair. So the court held that Wal-Mart offered no evidence that he couldn't perform the essential functions of

the positions and that the EEOC had established a prima facie discrimination case.

The burden then shifted back to Wal-Mart to produce a legitimate nondiscriminatory reason for its adverse employment action. It advanced several reasons for not hiring the applicant, mainly focusing on his job history and limited availability. The burden then shifted to the EEOC to demonstrate that these reasons were pretextual.

## The personnel manager testifies


First, as to the applicant's job history, the personnel manager conceded that she didn't know whether he had worked at a gas station before or after she declined to hire him. For this and other reasons, the court held that a reasonable jury could find — based on her testimony — that not hiring him based on his job history was pretextual.

*The burden then shifted back to Wal-Mart to produce a legitimate nondiscriminatory reason for its adverse employment action.*

Second, a reasonable jury could conclude that the applicant's lack of availability hadn't actually motivated Wal-Mart's decision. The personnel manager admitted that she had considered both applications in determining whether to hire him for the second job. And she conceded that she would hire him based solely on the availability he listed on his second application.

The Eighth Circuit held that, because the EEOC had provided sufficient evidence that Wal-Mart's stated reasons for not hiring him were pretextual, the trial court had erred in ruling for Wal-Mart without a trial.

## An interactive process

Obviously, savvy employers will avoid making assumptions about what a disabled employee is capable of doing. Furthermore, the ADA requires employers to engage in an interactive process with employees to determine whether a reasonable accommodation is possible. The employer here should have explored the applicant's abilities more carefully. 

# Pretext key in retaliation case

In *Preston v. Texas Department of Family and Protective Services*, an African-American employee claimed race discrimination and retaliation. The ensuing case shed light on the importance of employers carefully supporting their reasons for dismissing an employee.

## Racial discrimination alleged

After 11 years on the job, an African-American social-services caseworker was assigned to a white supervisor who gave her positive evaluations for two years. But the caseworker claimed that the supervisor began to treat her differently and gave her her first “unsuccessful” evaluation after she relayed other employees’ complaints that a manager was discriminating against them because they were African-Americans.

The caseworker filed an internal administrative complaint against the supervisor, alleging racial discrimination. The department’s investigation found no evidence of discrimination.

Then three incidents occurred: While the caseworker was the “on-call” caseworker for child-death cases, she failed to initiate a timely investigation and spoke disrespectfully about the supervisor and the risk director. The same day, her supervisor removed her from another case because she had left an unprofessional, discourteous message on a client’s answering machine. And six days later, the caseworker lied about having assigned a high-priority case to another supervisor.

## Policy violations

A week later, after discussing violations of department policy with her supervisor, the caseworker filed a second administrative complaint, alleging retaliation for having filed the earlier complaint. A month later, the department dismissed her.

The caseworker appealed her dismissal internally, but it was upheld on grounds she had violated department policy. She then sued the department. The trial court ruled for the department without a trial, finding that the facts were undisputed and the department was entitled to judgment as a matter of law.

## Fifth Circuit weighs in

To establish a discrimination case, plaintiffs must show that they’re members of a protected class, are qualified for their

positions, were subjected to an adverse employment action, and were replaced by someone outside the protected class. Or, in the case of disparate treatment, they must show that others similarly situated were treated more favorably.

The Fifth Circuit found that the employee’s claim that the department had discriminated against her by giving her two written admonishments couldn’t survive the test’s third prong, because Title VII was designed to address ultimate employment decisions, not every decision that might arguably tangentially affect those ultimate decisions. The court held that written admonishments don’t rise to the level of ultimate employment actions.

Next, the Fifth Circuit found that the employee failed the test’s fourth prong. Because she wasn’t replaced, she had to establish that the misconduct for which she was dismissed was nearly identical to that engaged in by a retained employee of another race. She failed to present any such evidence.

## Burden-shifting analysis

But even if the caseworker had established a prima-facie discrimination case, she would still lose on her retaliation claim, because the burden then shifts to the employer to articulate a legitimate nonretaliatory reason for the action. If the employer does this, the burden then shifts back to the employee to show that the employer’s stated reason was pretextual.

The department articulated several legitimate nondiscriminatory reasons for the written admonishments, for dismissing her and for those decisions’ timing. She had to rebut *each* articulated legitimate reason. The court found that she had shown some evidence of pretext for only two of the four articulated reasons. So the Fifth Circuit upheld dismissal of the case.

## Caution is the watchword

This case turned out well for this employer, but all employers should be careful that their dismissal reasons can withstand scrutiny. If a reason is found to be pretextual, a jury or court may infer that the real reason for dismissal was unlawful discrimination. 🏠

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