

An age-old problem: 'Stray remarks' have a way of coming home

Conventional wisdom has been that isolated or “stray” remarks alone by an employer do not prove discriminatory intent. Conventional wisdom may be wrong.

A recent 2nd Circuit Court of Appeals case (*Tomassi v. Insignia Financial Group, Inc.*, 478 F.3d 111, 2007) has clarified what it deemed a misconception of the true meaning of the term “stray remarks.”

'In your day and age'

In *Tomassi*, the plaintiff was a supervisor at an apartment complex. When she was terminated, she filed an age discrimination lawsuit. In it, she claimed that she had been fired because she was older than other employees and had been targeted for termination because of her age.

Of course, she had no direct proof. After all, employers seldom come right out and say they are terminating an employee because she's older than 40.

But she had to come up with something—and she did. As proof of her claim, she pointed to conversations her supervisor began with “in your day and age.”

Her former employer later told the court that the age-related comments had to do with her ability to relate to some of the tenants who were senior citizens. In other words, she had the patience and could empathize with and advise those who were closer to her age than the younger staff.

The District Court granted summary judgment—essentially throwing out the case—after concluding the age-related comments were stray remarks and not evidence of discrimination against older employees.

Intent matters, not words alone

Tomassi appealed, continuing her quest for vindication. She tried to convince the 2nd Circuit Court of Appeals that the stray comments were more than casual, nondiscriminatory chitchat, and were really signs of invidious age discrimination.

The 2nd Circuit reversed the lower court's decision, reinstating the lawsuit. It said that the appropriate standard is not whether the age-related comments are “stray,” but rather whether they evidenced a discriminatory state of mind.

In other words, it is the intent behind the words that counts. The closer the remark is to the alleged discriminatory behavior, both in time and subject matter, the more likely the remark is age discrimination proof, according to the appeals court.

It follows that the opposite is true. Stray comments that are far removed from any adverse employment decision, like a discharge, demotion, transfer or disciplinary action, are less likely to indicate a mind tainted by age discrimination.

The same goes for comments made by those who aren't part of the decision-making process.

Nonetheless, why risk getting entangled in a long and expensive lawsuit over a few ill-timed and insensitive remarks?

It's far better to remain vigilant and discourage any age-related comments in the workplace. Just as you wouldn't want managers, supervisors or any of your employers using racist or sexist banter, you should discourage age-related comments, too.

Avoiding age-related remarks

Cautious employers can learn much from the stray-remarks cases. Take the time to train everyone on how to treat all employees, whatever their age, race, sex or other characteristics. Common courtesy goes a long way.

- **Train supervisors and managers not to make comments or jokes or send e-mails that relate to protected characteristics.** They shouldn't tolerate other employees who do it. Explain why you also won't tolerate such behavior on the factory floor. Your electronic communications policy should explain that using

ADEA is old enough to sue

The Age Discrimination in Employment Act (ADEA) recently celebrated its 40th anniversary. That means Americans born the year the law was passed now are covered by its provisions. Although four decades have passed, there seems to be no end to the litigation it has spurred.

Consider the following:

- The EEOC received more than 16,500 age discrimination complaints in 2007.
- The EEOC collected more than \$51 million for age discrimination victims in 2007.
- As the population continues to age and baby boomers forgo early retirement in favor of continued work because they want to stay active or haven't saved enough to retire, experts believe the number of age discrimination cases will continue to rise.

company equipment to send risqué or offensive material of any sort is grounds for discipline, up to and including discharge.

- **Make sure supervisors and managers understand their roles as agents in the organization.** Their words or deeds can legally bind the employer. In addition, they need to understand the importance of setting a good example. If the corporate office is a bastion of ageism, you can be sure that the attitude will filter down throughout the company.
- **Investigate as soon as HR learns about possible inappropriate comments, jokes or the like.** It doesn't matter if the comments were oral, written or came via e-mail. If it turns out to be true, you must take appropriate action in accordance with your policies. Otherwise, you will encourage more age-related remarks and expose the company to potential liability. Be careful out there!