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Lou DiLorenzo

Beware of Stray Remarks

Conventional wisdom has been that isolated or "stray" remarks by an employer are not alone probative of discriminatory intent.

A recent Second Circuit case, Tomassi v. Insignia Financial Group, Inc., 478 F.3d 111

(2007), has clarified what it deemed a misconception of the term "stray remarks". In Tomassi, the plaintiff was a supervisor at an apartment complex. When terminated, she claimed it was due to her age. As proof of her claim, she pointed to conversations her supervisor began with, "in your day and age". The claim was these remarks recognized she was able to relate to the senior citizen residents. The District Court granted summary judgment finding the age-related comments were stray remarks.

The Second Circuit reversed, saying the appropriate standard is not whether they are "stray", but rather whether they evidenced a discriminatory state of mind. The closer the remark to the alleged discriminatory behavior, both in time and subject matter, the more probative. Therefore, remarks not proximate in time, not made by the decision-maker or unrelated to the adverse action are less related to the decision and may not be probative.

Cautious employers can learn much from the "stray" remark cases.

- 1) Supervisors and managers must be trained not to make comments, jokes or send e-mails that relate to protected characteristics, or tolerate those that do.
- 2) Supervisors and managers must understand their role as agents in the organization and that their words or deeds can legally bind the employer. In addition, they need to understand the importance of setting a good example.
- 3) If inappropriate comments or jokes have been told, verbally or in writing (*e.g.*, by e-mail), an investigation must be conducted and appropriate action taken against the offender.

Be careful out there!

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Business Activity Levels Off and Outlook Remains Subdued

The general business conditions index fell sharply in December. Thirty-five percent of respondents reported that conditions had improved, while 24 percent reported that conditions had deteriorated. The new orders index also declined markedly and the shipments index fell. The unfilled orders index declined. The delivery time index rose and the inventories index fell. The prices paid index eased several points but remained elevated while the prices received index held steady. The number of employee's index was little changed, while the average workweek index dropped sharply, its lowest reading in considerably more than a year. Future indexes were positive, but remained at the lower levels observed in November. The future general business conditions index held steady. The future new orders and shipments indexes declined but remained positive, while the future unfilled orders index fell below zero. The future prices paid index dipped several points but remained elevated, while the future prices received index adhered to its level of the past several months. Future employment indexes were positive. The capital expenditures index increased and the technology spending index rose to 15.0.

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