Department of Budget and Management
Office of the Statewide Equal Employment Opportunity Coordinator

EEO Connection

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Issue 3

Inside this issue:

Coordinator's Message

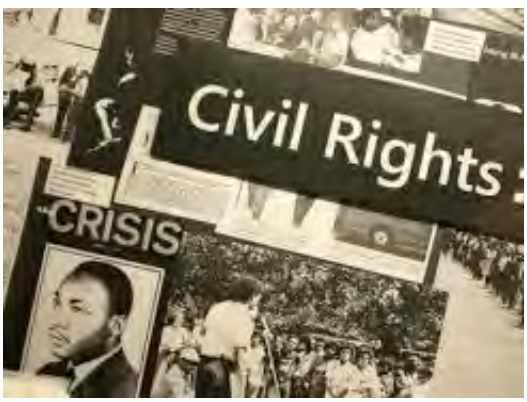
50 years ago, President Lyndon B. Johnson signed into law the Civil Rights Act of 1964. This Act has changed the face of the American workplace and changed individuals' thinking about the concept of fairness. It is unlawful to discriminate in employment based on race, gender, national origin, religion and so forth. This Act established the Equal Employment Opportunity Commission, who enforces the laws that define workplace protections and encourages companies to establish non-discrimination policies and procedures.

People that have come before us have paved the way so that we can have a "seat at the table." Trailblazers like Rosa Parks, who took a seat in the front of the bus and Dr. Martin Luther King Jr., who spoke out again discrimination and violence against African Americans, so that **all** races could have a seat at the table. In 1958, the Supreme Court ruled in favor of One Magazine (a socially active magazine for gay individuals) to continue its publication and distribution, so that the LGBT community could have a seat at the table. Edward Roberts, known in the disabled community as the father of the disability rights movement, was the first severely disabled individual who was admitted to the University of California, Berkeley. He fought for the support and accommodations he needed to attend school so that our disabled community could have a seat at the table. The First Amendment and our rights to freedom of religion earned us a seat at the table. Just as important as it is to have a "seat at the table," it is equally important that we have a voice in the discussions and decision making. Fifty years may have been enough time to change the face of the workplace, but the journey toward workplace equality is far from over. We are the trailblazers of today and we have to make history for tomorrow.

This issue highlights an EEOC racial harassment and retaliation lawsuit case in which the company paid $95,000 to settle. Also, read why Kmart Corporation paid $102,048 to settle a disability discrimination lawsuit. Learn how to avoid costly mistakes in workplace investigations; be a super sleuth. Taking immediate steps to keep harassment from reoccurring could save an employer from liability. Read what the 7th Circuit had to say. Can one accommodation trump another? Read this interesting article in the ADA Corner. Summary judgment may be useful in some cases, but not all. Read why this Complainant deserved his day in court. Take a look at our diversity calendar and plan your workplace events accordingly. Finally, test your knowledge in the Black History quiz. This is just some of what you will find in this issue. Turn the page to read on...

Enjoy!

Glynis Watford
Statewide EEO Coordinator



NOTEWORTHY RULING

Skanska USA Building to Pay $95,000 to Settle EEOC Racial Harassment and Retaliation Lawsuit

MEMPHIS, Tenn. - Skanska USA Building, Inc., a building contractor headquartered in Parsippany, N.J., will pay $95,000 to settle a racial harassment and retaliation lawsuit brought by the U.S. Equal Employment Opportunity Commission (EEOC).

According to the EEOC's suit, Skanska violated federal law by allowing workers to subject a class of black employees who were working as buck hoist operators to racial harassment, and by firing them for complaining to Skanska about the misconduct. Skanska served as the general contractor on the Methodist Le Bonheur Children's Hospital in Memphis, where the incidents in this lawsuit took place. The class of black employees worked for C-1, Inc. Construction Company, a minority-owned subcontractor for Skanska. Skanska awarded a subcontract to C-1 to provide buck hoist operations for the construction site and thereafter supervised all C-1 employees while at the work site.

The EEOC charged that Skanska failed to properly investigate complaints from the buck hoist operators that white employees subjected them to racially offensive comments and physical assault. The EEOC alleged that after Maurice Knox, one of the buck hoist operators, complained about having urine and feces thrown on him at the job site, Skanska cancelled its contract with C-1 Inc., and immediately fired all of its black buck hoist operators. With assistance from the Memphis Minority Business Council's president, Skanska reinstated the contract with C-1 and recalled the black buck hoist operators to work. The white employees, however, continued to subject the buck hoist operators to racial harassment on a daily basis.

Such alleged conduct violates Title VII of the Civil Rights Act of 1964. The EEOC filed suit (EEOC v. Skanska USA Building, Inc., Civil Action No. 2:10-cv-02717) in U.S. District Court for the Western District of Tennessee after first attempting to reach a pre-litigation settlement through its conciliation process.

During litigation, Skanska asserted that it did not employ the sub-contracted buck hoist operators. The U.S. District Court for the Western District of Tennessee ruled in favor of Skanska, granting summary judgment. After the EEOC appealed, the U.S. Court of Appeals for the Sixth Circuit reversed the ruling and remanded the case. The Sixth Circuit acknowledged that it had not previously applied the joint employer theory in a Title VII case. According to the joint employer theory, two separate entities are considered to be joint employers if they share or co-determine essential terms and conditions of employment. The Sixth Circuit adopted the joint employer theory in the Title VII context and held that there was sufficient evidence to hold Skanska liable as a joint employer because Skanska supervised and controlled the day-to-day activities of the buck hoist operators.

Besides the $95,000 in monetary relief, the three-year consent decree settling the lawsuit enjoins Skanska from subjecting employees to racial harassment or retaliating against any employee who lodges a discrimination complaint. The consent decree also requires the defendant to provide in-person training on race discrimination and retaliation, maintain records of any complaints of racial harassment, and provide annual reports to the EEOC. Knox intervened in the EEOC's lawsuit and settled his claim separately for an undisclosed amount.

"Employees should not have to endure a racially hostile work environment to make a living," said Faye Williams, regional attorney for the EEOC's Memphis District Office, which serves Tennessee, Arkansas and portions of Mississippi. "This case highlights the importance of companies providing training in the workplace on anti-discrimination laws for its employees."

According to company information, Skanska USA Building, Inc. is a building contractor with approximately 3,000 employees and 26 offices nationwide. Skanska acts as a general contractor for many construction sites, including the Methodist Le Bonheur Children's Hospital in Memphis, which was completed in 2010.

The EEOC enforces federal laws prohibiting employment discrimination. Further information about the EEOC is available on its web site at www.eeoc.gov.

In the end, anti-black, anti-female, and all forms of discrimination are equivalent to the same thing -- anti-humanism.

- Shirley Chisholm

NOTEWORTHY RULING

Kmart Will Pay $102,048 to Settle EEOC Disability Discrimination Lawsuit

BALTIMORE - Kmart Corporation, a leading national retailer, will pay $102,048 and provide significant equitable relief to settle a federal disability discrimination lawsuit, the U.S. Equal Employment Opportunity Commission (EEOC) announced.

According to the lawsuit, after Kmart offered Lorenzo Cook a job at its Hyattsville, Md., store, Cook advised the hiring manager that he could not provide a urine sample for the company's mandatory pre-employment drug screening due to his kidney disease and dialysis. Cook requested a reasonable accommodation such as a blood test, hair test, or other drug test that did not require a urine sample, the EEO charged. Kmart refused to provide that alternative test and denied Cook employment because of his disability, according to the suit.

Such alleged conduct violates the Americans with Disabilities Act (ADA), which requires employers to provide reasonable accommodation, including during the application and hiring process, unless it can show it would be an undue hardship. The ADA also prohibits employers from refusing to hire individuals because of their disability.

The EEOC filed suit (EEOC v. Kmart Corporation; Sears Holdings Management Corporation, Civil Action No. 13-cv-02576) in U.S. District Court for the District of Maryland after first attempting to reach a pre-litigation settlement through its conciliation process.

In addition to providing $102,048 in monetary relief to Cook, the two-year consent decree resolving this lawsuit provides substantial equitable relief, including enjoining Kmart from taking adverse employment actions on the basis of disability and failing to provide a reasonable accommodation. Kmart is also revising its drug testing policies and forms to specify the availability of reasonable accommodation for applicants or employees in the company's drug testing processes. The decree also requires Kmart to provide training on the equal employment opportunity laws enforced by the EEOC, and on Kmart's ADA policy and the provision of reasonable accommodation, including as it relates to the company's drug testing processes. This training is required for all store managers, store assistant managers and human resources leads in the district where the alleged discrimination occurred. Kmart will also post a notice regarding the resolution of this lawsuit.

"There was a readily available alternative to the urinalysis test in this situation," said EEOC Philadelphia District Director Spencer H. Lewis, Jr. "This case demonstrates that the consequences of failing to comply with the ADA can be far more expensive than the actual cost of providing a reasonable accommodation."

EEOC Philadelphia Regional Attorney Debra M. Lawrence added, "We are pleased that this settlement compensates Mr. Cook for the harm he suffered and contains equitable relief designed to ensure that all employees and applicants with disabilities will receive equal employment opportunities, including reasonable accommodations as required by law."

The EEOC enforces federal laws prohibiting employment discrimination. Further information about the Commission is available at its website, www.eeoc.gov.

The Philadelphia District Office of the EEOC oversees Pennsylvania, Maryland, Delaware, West Virginia and parts of New Jersey and Ohio. The legal staff of the Philadelphia District Office of the EEOC also prosecutes discrimination cases arising from Washington, D.C. and parts of Virginia.

NOTEWORTHY RULING

Ruby Tuesday Sued by EEOC for Sex Discrimination

EUGENE, Ore. - International restaurant chain Ruby Tuesday, Inc. discriminated against male employees for temporary assignments to a Utah resort, the U.S. Equal Employment Opportunity Commission (EEOC) charged in a lawsuit.

According to the EEOC's suit, in the spring of 2013 Ruby Tuesday posted an internal announcement within a 10-state region for temporary summer positions in Park City, Utah with company-provided housing for those selected. Andrew Herrera, a Ruby Tuesday employee since 2005 in Corvallis, Ore., wanted to apply because of the chance to earn more money in the busy summer resort town. However, the announcement stated that only females would be considered and Ruby Tuesday in fact selected only women for those summer jobs, supposedly from fears about housing employees of both genders together. Ruby Tuesday's gender-specific internal posting excluded Herrera and at least one other male employee from consideration for the temporary assignment.

Title VII of the Civil Rights Act of 1964 prohibits employers from giving more advantageous terms and conditions of employment to one group of individuals based on gender. The EEOC filed suit in U.S. District Court for the District of Oregon (Case No. 15-CV-109) after first attempting to reach a pre-litigation resolution through its conciliation process. The EEOC seeks monetary damages on behalf of Herrera and class members, training on anti-discrimination laws, posting of notices throughout the 10-state region, and other injunctive relief.

"It's rare to see an explicit example of sex discrimination like Ruby Tuesday's internal job announcement," noted EEOC San Francisco Regional Attorney William R. Tamayo. "This suit is a cautionary tale to employers that sex-based employment decisions are rarely justified, and are not consistent with good business judgment."

Seattle Field Office Director Nancy Sienko said, "Mr. Herrera was a longtime employee of Ruby Tuesday who had regularly trained new hires at the Corvallis restaurant. He was shocked and angered that Ruby Tuesday would categorically exclude him and other male employees from a lucrative summer assignment based purely on stereotypes about his gender. The company could have addressed any real privacy concerns by providing separate housing units for each gender in Park City, but chose an unlawful option instead."

Ruby Tuesday is a publicly traded company operating over 800 restaurants nationally and in 15 different foreign countries, with an estimated 34,000 employees. In 2013, the company reported gross revenue of $1.251 billion. The internal announcement was posted to a 10-state region that included Oregon, Arizona, Colorado, Iowa, Minnesota, Missouri, Nebraska, Nevada, and Utah. (rubytuesday.com)

The EEOC enforces federal laws prohibiting employment discrimination. Further information about the EEOC is available on its web site at www.eeoc.gov.

BE A SUPER SLEUTH

Don't be found guilty of a sloppy workplace investigation. Learn how to avoid costly mistakes.

A poorly conducted internal investigation can cost a company financially and damage its reputation. One that is prompt, thorough and impartial can help defend a company should a lawsuit be filed later. Having a fair investigative process helps to build morale and trust among employees. Although some people will not be happy regardless of the decision you make, trying to make sure we are going about it in a way that is sensitive and meaningful can help diminish their dissatisfaction, said Denise M. Domian, senior vice president of HR at The Bon-Ton Stores, Inc. in Milwaukee.

Make a Plan

Before beginning to investigate a complaint, a good investigator should first create a plan that clearly defines the purpose of the investigation and the scope of the investigation said Lorene Schaefer, an employment lawyer and workplace investigator.

Be Objective

While it may be tempting to tune out an employee who has made many prior complaints, don't do it. "You can't pass judgment or form an opinion based on personal feeling or prior dealings," says Sheila Felice, HR and risk manager for the optical division of Swarovski Optik NA Ltd., based in Cranston, R.I.

Tiffany Cardwell, PHR, vice president of HR for Signature Healthcare's rehab segment in Louisville, KY., advises, "Never make assumptions unless you have facts and date to back it up."

'He Said, She Said' Cases

Before interviewing witnesses, gather physical evidence that might validate the complaint. Then, plan the order in which interviews are conducted. Natalie Ivey, SPHR, author of *How to Conduct Internal Investigations* (Results Performance Consulting Inc., 2013 and president of Results Performance Consulting Inc. in Boca Raton, Fla.) says, "In determining which person to interview next, I ask, 'What's my risk of feeding the rumor mill, and what's my reward going to be? Is my reward really going to be greater than the risk?'" Ivey recalls a harassment case in which a male employee was accused of coming on to a female worker at the copy machine. The male claimed he was making copies, but Ivey had evidence that his copier code was never used. Ivey said she was able to gather the information beforehand and confront him last.

Avoid Aggressive Tactics

In 2006, jurors awarded Joaquin Robles 7.5 million after concluding that AutoZone investigators falsely imprisoned Robles when they held him in a back room and threatened him with arrest if he didn't confess. The award was reduced to $700,000 on appeal. At the time, AutoZone investigators used an interrogation method called the Reid Technique, frequently used by police and security officers to detect whether a suspect is lying.

"Ask straightforward questions to get straightforward answers, and always be respectful," says James Galluzzo, SPHR, HR director for the South Carolina State Housing Finance and Development Authority in Columbia, S.C. "Lawsuits can be avoided if there is a perception of fairness and respect that is delivered across the board."

Be Quick but Thorough

Stretching an investigation out over a lengthy period tells employees the alleged misconduct isn't important. As time goes by, it will become more difficult to collect evidence and get witnesses to talk. Details are forgotten. Documents disappear. Bad behavior continues.

Maintain Confidentiality

Encourage all those involved in the investigation to keep the proceedings confidential to protect the integrity of the process. If word leaks out, other employees will lose trust and might refuse to share what they know. However, don't promise an employee that his or her complaint will remain confidential, because it might be necessary to share the information down the road.

Reach a Conclusion

Ultimately, the investigator must weigh the evidence and conclude whether company policies were violated or misconduct occurred. However, the standard for workplace investigations is "the preponderance of the evidence." Is it more likely than not that the incident occurred?

For guidance, Shaefer recommends using the U.S. Equal Employment Opportunity Commission instructions on how to make credibility assessments and the standard jury instructions for the federal circuit court of appeals. The investigator should document any factual findings in a written report. Ivey asks that a lot of times, a well-written report can help you minimize the risk of liability.

Follow Up

- Submit the findings to the decision-maker, who will determine what disciplinary action to take.
- Notify the employee who made the complaint that action was taken-even if details can't be shared for privacy reasons.
- Reintegrate the employees involved back into the workplace, shifting focus from the complaint to the changes the investigation has brought about.
- Remind managers that retaliation won't be tolerated, and check back within six months to ensure that there has been none.
- Review the investigation to determine what could be done better the next time.
- Look for patterns in complaints that might suggest more training is needed to avoid similar problems in the future.

While every complaint is unique, having a well-defined, consistent process in place can ward off future lawsuits. Treating employees with respect during the process has additional rewards: building employee trust and creating a better work environment.

As Ivey says: "the best investigation is the one you don't need to conduct."

Written by Dori Meinert, senior writer for HR Magazine.

SPOT LIGHT—cont'd

Prompt Response to Alleged Harassment Averts Liability

Muhammad v Caterpillar Inc., 7th Cir., No. 12-1723

An employer that quickly responded to complaints of racial and sexual harassment and took immediate steps to keep the harassment from reoccurring could not be held liable for the underlying harassment, the 7th U.S. Circuit Court of Appeals held.

In 2009, Warnether Muhammad sued his employer, Caterpillar Inc., alleging that he was subject to a hostile work environment based on racial and sexual harassment in violation of Title VII of the Civil Rights Act of 1964. The suit stemmed from events that occurred in 2006 when Muhammad was subject to offensive oral and written comments about his race and perceived sexual orientation.

There were three reported incidents of offensive oral comments made to Muhammad by his co-workers. Muhammad reported each incident either to the company's HR department or to his supervisor, who then reported the incident to HR.

In addition to the oral comments, there were three instances in which offensive statements about Muhammad were written on the walls of the restroom nearest his workstation. Each time Muhammad reported the graffiti, Caterpillar immediately painted over it. After the second occurrence, Muhammad's supervisor addressed the graffiti with all of the co-workers on Muhammad's shift during a shift meeting. When the graffiti appeared a third time, the supervisor warned all employees that "anyone caught defacing the walls would be fired."

On appeal, the 7th Circuit upheld the trial court's dismissal of the complaint, stating that Muhammad's claim of sexual harassment failed because Title VII only requires an employer to "take action reasonably calculated to stop unlawful harassment." Because Caterpillar's responses permanently ended the harassment complained of, it could not be liable.

By Michael A. Warner Jr. and Erin Fowler, attorneys with Franczek Radelet, the Worklaw® Network member firm in Chicago.

ADA CORNER

Justice Department Reaches Settlements with Four Cities Across the Country to Remove Disability Related Questions from Job Applications and Ensure Web Accessibility

The Justice Department announced that it has reached settlement agreements with the cities of DeKalb, Illinois; Vero Beach, Florida; Fallon, Nevada; and Isle of Palms, South Carolina. The agreements resolve investigations of each city under Title I of the Americans with Disabilities Act (ADA). The investigations found that each city's online employment application asked questions about disabilities in violation of the ADA. The ADA does not permit employers to inquire as to whether an applicant is an individual with a disability or as to the nature of such disability before making a conditional offer of employment. Under Section 503 of the Rehabilitation Act of 1973, however, federal contractors subject to affirmative action requirements may invite an applicant voluntarily to self-identify as an individual with a disability, consistent with certain requirements.

The investigations also found that each city's online employment opportunities website or job applications were not fully accessible to people with disabilities, such as those who are blind or have low vision, are deaf or hard of hearing, or have physical disabilities affecting manual dexterity (such as limited ability to use a mouse). In recent months, the department reached similar settlement agreements with the city of Hubbard, Oregon, and Florida State University.

"Congress intended for people with disabilities to be able to compete for jobs on a level playing field," said Acting Assistant Attorney General Vanita Gupta of the Civil Rights Division. "Including disability-based questions on a job application is illegal and creates barriers for people with disabilities. These agreements ensure that people with disabilities will have an equal chance to compete for public

ADA CORNER—cont'd

sector jobs. We commend each city for its cooperation and efforts to ensure accessibility and fairness in the job application process."

Under the settlement agreements, each city agrees to ensure that its hiring policies and procedures do not discriminate against any applicant on the basis of disability, including by:

- not conducting a medical examination or making a disability-related inquiry of a job applicant before a conditional offer of employment is made;
- not requiring a medical examination or making inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity;
- maintaining the medical or disability-related information of applicants and employees in separate, confidential medical files;
- training employees who make hiring or personnel decisions on the requirements of the ADA, designating an individual to address ADA compliance matters, and reporting on compliance; and
- ensuring that its online employment opportunities website and job applications conform with the Web Content Accessibility Guidelines 2.0, which are industry guidelines for making web content accessible.

Those interested in finding out more about the ADA may call the Justice Department's toll-free ADA information line at 800-514-0301 (TDD 800-514-0383) or visit www.ada.gov.

"I don't have a dis-ability
I have a different-ability."
Robert M. Hensel

Can One Accommodation Trump Another?

"I am highly allergic to both dogs and cats—whether they are service animals or not. Can I request, as an accommodation to my serious allergy, that no service dogs or cats be permitted in my office or class?" What happens when one individual's accommodations creates a need for someone else to be accommodated?

That help came in the form of a link to the Job Accommodation Network (JAN) website. J.A.N. says:

"Dealing with coworkers who are allergic to the service animal:

- Allow the employees to work in different areas of the building.
- Establish different paths of travel for each employee.
- Use a portable air purifier at each workstation.
- Allow flexible scheduling so the employees do not work at the same time.
- Allow one of the employees to work at home or to move to another location.
- Develop a plan between the employees so they are not using common areas—such as the break room and restroom—at the same time.
- Allow the employees to take periodic rest breaks if needed, e.g., to take medication.
- Ask the employee who uses the service animal if (s) he is able to temporarily use other accommodations to replace the functions performed by the service animal for meetings attended by both employees.
- Arrange for alternatives to in-person communication, such as e-mail, telephone, teleconferencing and videoconferencing.

ADA CORNER—Cont'd

Can One Accommodation Trump Another?

- Ask the employee who uses a service animal if (s)he is willing to use dander care products on the animal regularly.

- Ask the employee who is allergic to the service animal if (s)he want to, and would benefit from, wearing an allergen/nuisance mask.

- Add HEPA filters to the existing ventilation system.

- Have the work area—including carpets, cubicle walls, and window treatments—cleaned, dusted and vacuumed regularly."

That's right. Option No. 1 is to determine if there is a way that both individuals can be accommodated and JAN has come up with several alternatives to achieve that goal.

The ADA National Network provides:

"Allergies and fear of dogs are not valid reasons for denying access or refusing service to people using service animals. If employees, fellow travelers, or customers are afraid of service animals, a solution may be to allow enough space for that person to avoid getting close to the service animals.

Most allergies to animals are caused by direct contact with the animal. A separated space might be adequate to avoid allergic reactions.

If a person is at risk of a significant allergic reaction to an animal, it is the responsibility of the business or government entity to find a way to accommodate both the individual using the service animal and the individual with the allergy."

So what if none of these options work? For most federal worksites this wouldn't be true, but what if the workplace simply won't allow for sufficient physical separation of the individuals? Well, then we just resort to the standard analysis. The agency has to provide reasonable accommodation unless it would be an undue hardship. If one individual can't perform essential job functions without the service animal and the other can't perform essential job functions with the service animal in the workplace than it would be an undue hardship. We would then turn to the accommodation of last resort.

That, of course, begs the question of which employee is it an undue hardship to accommodate. There are two ways to approach that question. One is by whoever is in the workplace first. Under that approach, the agency would have to look to reassign the individual entering the workplace.

That approach works, but let's add one more factor. Assume there is no reassignment position for the employee entering the workplace but there is for the employee already there. What to do then?

I don't have any specific case law, but instinct tells me that the agency should reassign the employee already there because the Commission would favor accommodating both individuals rather than accommodating one at the expense of the other.

Written by Ernest Hadley, freelance writer; former President Federal Employment Law Training Group

CASE SUMMARY

Summary Judgment Can't Shield Employer in Discrimination Case

Motions for summary judgment in federal court are oftentimes one of the most over-utilized tools in employment discrimination litigation. Over the years, this column has lamented the overuse of employer-based motions for summary judgment. In fact, one federal judge has even advocated for abolishing the use of summary judgment altogether in employment cases. (See "Time to Abolish Summary Judgment in Employment Law Cases?" published July 26, 2013, in The Legal.)

In the most recent installment of the summary judgment roulette wheel, a decision from the U.S. District Court for the Eastern District of Pennsylvania emphasizes the virtual exercise in futility that is the employer's motion for summary judgment. In the matter of *Henry v. Acme*, 2014 U.S. Dist. LEXIS 29437 (E.D. Pa. Feb. 25, 2014), the plaintiff, John Henry, filed suit against his former employer, Acme Markets Inc., alleging that he was unlawfully terminated based upon his age under the Age Discrimination in Employment Act (ADEA).

The opinion from the court recited the following facts: Henry worked for Acme since 1972, ascending to the position of store director in 1990 at the age of 34. Throughout the first decade of his employment as store director, his job performance "met or exceeded expectations," the opinion said. In 2003, Henry was transferred to the Acme store in Ogletown, Del., and was rated "below expectations" on his 2004 midyear review. According to the opinion, from 2000-06, Henry met expectations on all his year-end reviews, including his 2004 year-end review. In April 2006, Henry came under the supervision of a new district manager, Kent England. During an early walk-through of Henry's store, it was alleged that England told Henry "that he [England] was five years younger than plaintiff and already a district manager." England also made a comment at that time about the plaintiff's "years of experience," according to the opinion. In the following months, England rated Henry's performance "below expectations" in a 2006 midyear review, and ultimately stated that the plaintiff met expectations in the plaintiff's 2006 year-end review.

According to the court, in 2008 and 2009, England rated the plaintiff "below expectations" and placed him on a performance improvement plan (PIP). On April 30, 2009, England rated Henry "below expectations" in his 2009 year-end review and he ended up firing the plaintiff May 2, 2009.

The district court began its analysis of the case by reciting the appropriate standard for analyzing age discrimination cases. A plaintiff makes out a prima facie case of age discrimination under the ADEA by showing: (1) that he is over 40; (2) that he is qualified for the position in question; (3) that he suffered an adverse employment decision; and (4) that he was replaced by a sufficiently younger person to permit an inference of age discrimination. Acme argued that the plaintiff could not establish the fourth element because an employee older than him ultimately was hired for his position; however, the court rejected this argument because the evidence established that the plaintiff initially was replaced by an employee 10 years his junior. The court concluded that a 10-year age difference between Henry and his immediate, albeit temporary, replacement was sufficient to establish the fourth prong of the plaintiff's prima facie case (citing *Sempier v. Johnson & Higgins*, 45 F.3d 724, 729-30 (3d Cir. 1995), holding that a 10-year age difference between a discharged employee and his or her temporary replacement establishes a prima facie case).

Next, the district court analyzed the pretext prong of the case. Acme argued that the plaintiff could not show pretext for three reasons: (1) the plaintiff received one year-end and one midyear review rating him below expectations before England became his manager; (2) England documented numerous alleged deficiencies in the plaintiff's job performance; and (3) all nine store directors older than the plaintiff who were supervised by England met expectations on performance reviews in 2008 and 2009, when England rated the plaintiff below expectations.

Not surprisingly, Henry vigorously disputed each of these proffered arguments. In an effort to demonstrate the weaknesses, implausibilities, inconsistencies, incoherencies or contradictions in Acme's proffered legitimate reasons, Henry claimed that Acme did not rate him below expectations on his 2000 year-end review for poor performance; rather, he claimed that the review was based on the fact that store re-

CASE SUMMARY -cont'd

Summary Judgment Can't Shield Employer in Discrimination Case (con't)

modeling costs were incorporated without adjustment into his sales numbers. In further support, the plaintiff cited his salary increase and bonus in 2000 as evidence that his performance was satisfactory. Furthermore, the court noted, Acme, as a policy, ignores below-expectations ratings on midyear reviews when the employee is rated "meets or exceeds expectations" at the end of the year, as the plaintiff was in 2004 and 2006. With respect to the 2008 and 2009 performance ratings, Henry argued that they were based on "factual misstatements, exaggerations, and heightened scrutiny to create a pretextual case to support plaintiff's termination," the opinion said. The court noted that Henry received stock options reserved exclusively for "a select group of associates who play a significant role in the long-term success of our company" just two days before the "below expectations" rating. The plaintiff also presented evidence that England set his sales and profit numbers at an unrealistically high level to build a case supporting the plaintiff's termination. In support, Henry pointed to the fact that younger employees missed sales and profit targets but were rated higher, as well as the fact that two years after the plaintiff's termination, sales and profits targets were reduced by several million dollars. Finally, the court noted, regarding the nine store directors older than the plaintiff who were managed by England, the plaintiff claimed that England (1) had no reason to discriminate against them because they were on the cusp of retirement or (2) forced them into retirement. Of the nine store directors older than the plaintiff, the opinion noted that one was placed on disability leave, five retired shortly after the plaintiff was terminated and three other store directors over the age of 50 were terminated by England before 2011.

Without any further analysis, the district court wisely concluded that the conflicting declarations and records surrounding the circumstances of Henry's termination, coupled with Acme's proffered nondiscriminatory reason for terminating him, made the issuance of summary judgment inappropriate. This case once again demonstrates the futile nature of trying to use summary judgment as a sword. The factual discrepancies and inconsistencies were so evident that the only proper way to adjudicate this dispute was through a trial, where a fact-finder could make credibility determinations and assess the believability of the explanations offered by the employer. This is a very good example of a trial court refusing to weigh in on the credibility of the proffered evidence. As the district courts have routinely been instructed by their reviewing appellate courts, it is not for the trial judge to usurp the function of the fact-finder. This is especially true in employment cases where the facts are often hotly disputed. While there is no guarantee that Henry will ultimately prevail at trial on these facts, the court has fulfilled its duty in allowing him to have his day in court.

Jeffrey Campolongo, founder of the Law Office of Jeffrey Campolongo.

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TRAININGS & MEETINGS

March 10, 2015
ADA Coordinator's Meeting
9:30-11:30 p.m.
201 W. Preston Street, Room L-1
Webinar: J.A.N.

June 11, 2015
Federal Executive Board
Annual Diversity and Inclusion Conference
Maritime Institute of Technology and Graduate Studies
For more info. visit www.baltimore.feb.gov/

June 25-26, 2015
The Center for Alternative Dispute Resolution 2015 Annual Conference
Greenbelt, MD
For more info. visit www.natlctr4adr.org

July 8-10, 2015
EEO Retreat
St. Mary's College
Save the Date

Statewide EEO Coordinator's
EEO Group Meeting
Date/Time TBA

DIVERSITY CORNER

February

Black History Month

February 1
National Freedom Day

February 4
TU B'SHVAT - Jewish

February 18
Ash Wednesday - Western Christian

February 19
Asian Lunar New Year - Year of Sheep/Goat.

March

National Women's History Month
National Developmental Disabilities Awareness Month
National Deaf History Month

March 5
Purim– Jewish

March 17
St. Patrick's Day-Irish

March 29
Palm Sunday—Christian

April

Autism Awareness Month

April 3
Good Friday—Christian
Passover—Jewish

April 5
Easter—Christian

May

National Asian-American/Pacific Islander Heritage Month

May 5
Cinco De Mayo

Black History Quiz

1. What was the only Southern state to permit slave enlistments in the military in 1780?
2. Despite a 1792 discriminatory law against Blacks in the new U.S. military, which of the country's armed forces began to enlist free blacks in the 1790's?
3. Which state east of the Mississippi was the first to give African American women the right to vote, in 1913?
4. This graduate of Yale Law School was appointed commissioner and chairman of the U.S. Equal Employment Opportunity Commission by President Ronald Reagan in 1982.

Answers to quiz:
1. Maryland, 2. U.S. Navy, 3. Illinois, 4. Clarence Thomas