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LABOR RELATIONS

Have it your way: Court sides with labor organizer

by Steve Jones

The U.S. 8th Circuit Court of Appeals (whose decisions cover Arkansas employers) recently enforced a National Labor Relations Board (NLRB) order that found a Burger King franchisee violated the National Labor Relations Act (NLRA) by declining to hire an employee for having engaged in protected labor activity.

Background

In March 2015, EYM King acquired numerous Burger King franchises in Kansas City, Missouri, from Strategic Restaurants Acquisitions Company, LLC. These acquisitions included a location at 1102 East 47th Street. EYM King retained the 47th Street store's general manager, LaReda Hayes, and gave her permission to rehire Strategic employees. Hayes rehired most of the Strategic employees, but not Terrance Wise, a well-known labor organizer who had been working at various Burger King stores for over 11 years and at the 47th Street store since early 2012.

Hayes told Wise that he wasn't being rehired because of a change in his schedule availability and his insubordination. He had filled out an application form that indicated he was no longer available to work overnight on Saturdays or anytime on Sundays.

During his time at the 47th Street store, Wise had received a few disciplinary warnings. One of those warnings occurred on April 21, 2014, for arriving to work one hour late, and that was followed by a second warning on May 5 for arriving 15 minutes late. He had also received a warning on May 6 for not calling in more than three hours before his shift to inform supervisors that he was running a little late. Although he received no further formal warnings, he was twice verbally counseled by Hayes for cooking too much food.

Wise participated in the Workers' Organizing Committee–Kansas City, which advocated that fast-food employees receive a minimum wage of $15 per hour, a request referred to as the "Fight for $15." Wise had assumed a leadership role in the labor organization and was responsible for bringing the "Fight for $15" campaign to the 47th Street store. He also assisted with bringing unfair labor practice charges against the store in May 2014. Hayes was aware of those activities.

The NLRB General Counsel filed a complaint with the Board alleging that EYM King had violated Sections 8(a)(1) and (3) of the NLRA by refusing to hire Wise. An administrative law judge (ALJ) held a hearing at which Hayes testified that her decision not to hire Wise was based on his limited availability, several instances of insubordination, and

his record of tardiness. She told the ALJ that the extent of Wise's behavioral problems weren't documented because after May 2014, Strategic had directed her to report to HR any negative behavior by Wise (and other individuals involved with the Workers' Organizing Committee). Strategic would then determine an appropriate response. Hayes testified that she e-mailed Strategic a number of times about Wise's behavior but never received a response. She eventually stopped sending the reports.

The ALJ found that Hayes wasn't "an overall credible witness" and that her stated reasons for declining to hire Wise were implausible. The ALJ then concluded that the decision not to hire Wise was motivated in part by his involvement in protected labor activities, in violation of the NLRA. The Board agreed with those determinations, and petitioned the 8th Circuit for enforcement of its order.

8th Circuit's opinion

The court explained that under Section 8(a)(3) of the NLRA, certain discrimination in the hiring of employees is an unfair labor practice. It continued explaining that the Board has adopted a three-part test for a refusal-to-hire violation under Section 8(a)(3). The General Counsel must first show that:

(1) The employer was hiring, or had concrete plans to hire;

(2) The applicant had experience or training relevant to the requirements of the position; and

(3) Anti-labor organization animus contributed to the decision not to hire the applicant.

The burden then shifts to the employer to show that it wouldn't have hired the applicant even in the absence of his labor organization activity or affiliation.

The court noted that because EYM King doesn't dispute that it was hiring or that Wise was qualified for the position, it had to determine whether substantial evidence supported the Board's determination that his involvement in the Workers' Organizing Committee was a motivating factor in EYM King's decision not to hire him.

The court recognized that both implausible explanations and false or shifting reasons support a finding of illegal motivation. When an employer's explanation fails to withstand scrutiny, it's considered pretextual, thereby providing a substantial reason to reject the argument that the employer would have taken the same action regardless of any protected activity.

Hayes testified that she declined to hire Wise because of his change in schedule, tardiness, and insubordination. The 8th Circuit concluded that substantial evidence supported the Board's determination that her reasons were pretextual.

First, Wise didn't dramatically change his availability, as EYM King argued. Although he had recently started working night shifts, he had been working primarily day shifts at the beginning of 2015, and he only limited his availability for two nights and one day per week.

Second, Wise had a minor disciplinary record spread out over years of working at Burger King (all of his formal warnings were issued in April and May 2014). Hayes also hadn't disciplined him for some of his allegedly insubordinate behavior before she had allegedly received a directive from Strategic telling her to run all discipline through HR.

The credibility of key decision makers is critical in NLRA discrimination cases.

Finally, Hayes provided vague and inconsistent testimony throughout the hearing, including testimony that she both did and "did not" inform HR about an incident in which Wise allegedly took hamburgers after a shift. The court believed that her implausible explanations provided substantial evidence to support the Board's determination that her hiring decision was based on an improper motivation.

EYM King argued that the Board erred by declining to credit Hayes' testimony that in May 2014 she received a directive from Strategic that precluded her from disciplining Wise without the approval of HR. However, the court responded that the Board actually observed that she had failed to provide evidence to corroborate her version of some events. It further found that even if it were to conclude that the Board erred by declining to credit her testimony, there was other substantial evidence to support the Board's determination that her explanation was pretextual. It pointed to the Board's finding regarding her demeanor at the hearing and her vague and inconsistent testimony.

The court, therefore, concluded that substantial evidence supported the Board's determination that EYM King refused to hire Wise because of his participation in protected labor activities, in violation of Sections 8(a)(1) and (3) of the NLRA.

Bottom line

The credibility of key decision makers is critical in NLRA discrimination cases. When a decision maker contradicts herself about important events and provides implausible reasons for an adverse employment action, judges and courts will likely find that her given reasons were pretextual.

You may contact the author at sjones@jacknelsonjones.com. ✤

RACE DISCRIMINATION

Tick tock: Employer didn't discriminate against employees fired for time theft

by Steve Jones

The 8th Circuit recently affirmed a lower court's dismissal of two employees' lawsuits claiming that they were terminated as a result of race discrimination.

Background

Zyeair Smith and Sam Edwards, both African-American men, were employees of Hiland Roberts Dairy Company, LLC, and worked at its facility in Omaha, Nebraska. Both worked as part of a sanitation crew, responsible for equipment maintenance between the facility's production cycles. On July 26, 2013, Smith—at Edwards's request—used Edwards' company-issued identification card to clock Edwards out after he had left the facility, in violation of the company's time card policies. Smith initially didn't admit to clocking Edwards out, but he later confessed when confronted with a video recording of the incident. Less than one week later, Hiland Dairy conducted an investigation and fired them both, citing "theft of time" and dishonest conduct.

Smith and Edwards filed lawsuits against Hiland Dairy alleging unlawful termination in violation of Title VII of the Civil Rights Act of 1964. In support of their employment discrimination claims, they alleged that two similarly situated white employees violated the same policies by leaving work without clocking out and falling asleep on the job but weren't terminated.

The district court dismissed their claims. Both Smith and Edwards appealed, and their appeals were heard together by the 8th Circuit.

ASK THE EDITOR

Bring a friend: employee's right to representation during disciplinary meetings

by Steve Jones

Q *Does an employee have the right to have someone present at his termination and/or disciplinary action?*

A Probably not, unless your company has a union.

NLRA

In the 1975 *NLRB v. Weingarten* case, the U.S. Supreme Court established that the National Labor Relations Act's (NLRA) "mutual aid and protection" section gave union employees the right to have a union representative present during certain meetings with their employer. An employee in a union setting has the right to be accompanied by a union representative if an employer calls an investigatory or predisciplinary meeting that the employee reasonably believes may lead to his discipline and he requests such representation. The purpose of the representation is to ensure evenhanded treatment of employees. These are called *"Weingarten* rights."

An employee isn't entitled to representation when the employer is merely instructing or training or when it has expressly assured him that no discipline will result from the facts obtained in an interview meeting. He's also not entitled to representation when there's no belief that he may be disciplined, but instead, another employee could be disciplined.

Although you may have already made a decision and simply plan to inform the employee of the discipline or termination during the meeting you describe and your purpose isn't to seek information, it's best to anticipate that questions about the employee's conduct could arise. Accordingly, you should assume that he would be entitled to union representation. In fact, I would recommend you notify the union of any disciplinary meeting and request that a union representative be present in order to avoid any claim that you denied the employee's *Weingarten* rights request. You will want another company witness present during these types of meetings as well. An HR person is usually the best choice.

In nonunion settings, an employee has no right to representation during these types of meetings unless it is provided for by company policy.

Each month, the editors will answer one or more questions about labor and employment issues of general interest selected from our readers' submissions. If you have a question, please send it to "Ask the Editor," c/o Steve Jones, Jack Nelson Jones, P.A., One Cantrell Center, 2800 Cantrell Road, Suite 500, Little Rock, AR 72202; phone (501) 375-1122; fax (501) 375-1027; e-mail sjones@jacknelsonjones.com. ✤

8th Circuit's opinion

On appeal, because Smith and Edwards didn't produce direct evidence of discrimination, the court applied the *McDonnell Douglas* burden-shifting framework appropriate for these types of cases. Under the *McDonnell Douglas* framework, an employee must first establish a case of race discrimination by showing:

(1) He was a member of a protected group;

(2) He was qualified to perform the job;

(3) He suffered an adverse employment action; and

(4) Circumstances allow an inference of discrimination.

If an employee establishes this initial burden, a presumption of discrimination arises, and the burden shifts to the employer to present evidence of a legitimate nondiscriminatory reason for its adverse employment action. If the employer satisfies its burden, the presumption disappears, and the employee must provide evidence demonstrating that the employer's proffered nondiscriminatory reason is mere pretext (an excuse) for intentional discrimination.

Smith and Edwards conceded that Hiland Dairy satisfied its burden by articulating and presenting evidence of a legitimate and nondiscriminatory reason for firing them. The court began its analysis by explaining that the former employees had to discredit Hiland Dairy's proffered nondiscriminatory reason by providing evidence that it was a pretext for discrimination.

According to the court, an employee may demonstrate pretext by showing, among other things, that an employer:

(1) Failed to follow its own policies;

(2) Treated similarly situated employees differently; or

(3) Shifted its explanation of the employment decision.

Smith and Edwards contended the circumstances of their terminations created an inference of discrimination because they were disciplined more severely than similarly situated white employees—Bernie Turbes and Steve Rezac—for similar offenses. At the pretext stage, the court noted, the test for whether someone is sufficiently similarly situated is rigorous. Smith and Edwards had to establish they and the white employees were "similarly situated in all relevant respects." Additionally, the employees used for comparison must have dealt with the same supervisor, been subject to the same standards, and engaged in the same conduct without any mitigating or distinguishing circumstances.

Although the employees here all had the same supervisors and were subject to the same employment standards, the district court found the presence of mitigating and/or distinguishing circumstances prevented the conclusion that Turbes and Rezac were similarly situated to Smith and Edwards. Smith and Edwards contended that a reasonable jury could find Turbes' and Rezac's conduct "was of comparable seriousness." Smith was fired for using Edwards' identification card to clock him out after he had left the premises. Edwards was fired for directing Smith to clock him out after he had left the premises.

According to Hiland Dairy, Smith's and Edwards's actions constituted "theft of time" and dishonest conduct in violation of its time card policy. By contrast, Turbes was only "written up" for failing to clock out when he left the premises during his lunch hour. However, he was a lead quality-assurance foreman, and the company allowed employees in that position to stay on the clock during their lunch breaks if they were staying on the premises. When he was confronted about the incident, he claimed he didn't know he had to clock out during his lunch breaks if he left the facility. Rezac only received a written warning for sleeping on the job, and he wasn't terminated because he was a long-term employee and there was some doubt as to whether he actually was sleeping.

Evidence showing an employer has failed to follow its own policies may indicate pretext.

While each instance of compared misconduct involved an allegation of a type of time theft, Hiland Dairy perceived that Smith's and Edwards' violations—but not Turbes' and Rezac's—involved dishonesty. And Smith and Edwards worked together to deceive Hiland Dairy. The 8th Circuit stated that Hiland Dairy's reasons were significant and sufficient distinctions, making the situations not similarly situated in all relevant respects, and they supported the district court's conclusion.

Smith and Edwards next argued Hiland Dairy's investigation of their offenses was inconsistent with its policies and their collective bargaining agreement. Although they conceded that Hiland Dairy "diligently gathered evidence" of their alleged misconduct, they asserted its investigation was nonetheless incomplete because it didn't "look at Edwards' time card for the day" and determine whether he was entitled to a break.

The 8th Circuit explained that evidence showing an employer has failed to follow its own policies may indicate pretext. However, an employer can certainly choose how to run its business, including making a decision not to follow its own personnel policies regarding termination of an employee, as long as it doesn't unlawfully discriminate in doing so. The court also noted Hiland Dairy's disciplinary counseling process and the collective bargaining agreement didn't establish the scope of an investigation. They only required that an investigation occur before termination.

Smith and Edwards didn't offer any evidence supporting their allegation that the company's investigation

was incomplete. Even if the investigation were somehow flawed, the court pointed out that a shortcoming in an internal investigation alone, without additional evidence of pretext, wouldn't suffice to support an inference of discrimination on the part of the employer.

Smith and Edwards also suggested their supervisor articulated shifting explanations for why they were fired. According to the 8th Circuit, a change in an employer's legitimate nondiscriminatory reason for firing an employee constitutes pretext only if the discrepancy is "substantial." Smith and Edwards contended their supervisor testified that "time theft was part of the reason for [Edwards'] termination" and later stated that "Edwards was terminated because he had Smith clock out for him." Those statements, the court reasoned, neither conflicted nor were substantially different because the reasons and explanations for the terminations weren't actually different at all. Accordingly, the 8th Circuit affirmed the judgment of the district court.

Bottom line

This is yet another case illustrating the difficulty employees have pointing to other employees' discipline (or lack of discipline) as evidence of discrimination. The court will only consider such treatment if it involves virtually identical offenses by employees in similar positions with the same decision maker. Moreover, the court will likely not consider mere errors in—or poorly executed—investigations as evidence that the employer's reasons for discipline were pretextual.

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AGE DISCRIMINATION

About face: denial of promotion and termination not discrimination

by Steve Jones

The 8th Circuit recently affirmed a district court's dismissal of an IT professional's claim of age discrimination.

Background

Skybridge Americas, Inc., is a retail order-fulfillment business consisting of two divisions: a warehouse and distribution division that fulfills orders, and a call center division. The call center division employs about 700 people and accounts for more than 75 percent of Skybridge's business, while the fulfillment division employs fewer than 50 people and accounts for less than 25 percent of the company's business.

James Aulick is an experienced and credentialed information technology (IT) professional. In addition to his science degree, he has an MBA and multiple professional credentials. At points in his career, he had managed IT staffs with over 70 employees for retail corporations. When Skybridge bought the fulfillment and call center businesses from the previous owner, Aulick—then 61 years old—was serving as senior director of IT for the fulfillment business. After the purchase, Skybridge hired him as senior IT director of fulfillment with an at-will employment contract. He had no experience with the call center business.

Over the next two years, Skybridge's CEO and sole shareholder Mark Morris hired six new people to serve in executive roles. Four were age 57 or older, one was 47, and another was 35. Kevin Cattoor, 57, was one of these hires, becoming CEO of Skybridge in November 2011.

In September 2012, Cattoor submitted a memorandum summarizing his views on the fulfillment division's performance and areas of needed improvement. He wrote that "IT management is not optimum." He further stated that Aulick "is not capable of leading IT projects" and that he "has not effectively established IT priorities, work plans, communicated the plan to those who will be involved with the project . . . and updated everyone on the status of projects." Cattoor mentioned "numerous discussions" with Aulick centered on improving communication and leadership skills. Cattoor also noted a longstanding lack of confidence "in the IT department's ability to get things done effectively." Cattoor concluded his assessment of Aulick by noting, "We need to continue to work with [him] to overcome his shortcomings. At the same time we should be exploring other alternatives for management of IT."

December 2012 saw difficulties arise in the business relationship between Skybridge and Four Corners, one of Skybridge's most significant clients. Issues relating to IT infrastructure had previously arisen between Four Corners and Skybridge's predecessor, Argenbright. Aulick had resolved those problems, so Skybridge assigned him to deal with Four Corners again.

In March 2013, consultant Dave Brady conducted an external audit of Skybridge. The company spent a total of $17,000 on this audit. Brady's final report to executive management recommended combining the separate IT departments—for the call center and fulfillment divisions—into one department headed by a new Chief Technology Officer (CTO). Brady considered Aulick to be a "strategic thinker" and the best internal candidate for the proposed CTO position. But Brady recommended that Skybridge also consider external candidates. Skybridge then asked Brady if he would be interested in the CTO position. He declined the offer.

Shortly thereafter, Cattoor and the vice president of the fulfillment division, John Turner, met with Aulick. Cattoor discussed the contents of Brady's report and informed Aulick that Brady had declined an offer to

become CTO. He also told Aulick that Brady viewed him as the sole current employee capable of performing as CTO. Cattoor then asked if Aulick was interested in applying for the position, and Aulick said he was. Cattoor responded, "Good. I'd be disappointed if you weren't." Going further, Cattoor said, "The job is yours to lose. You've got the inside track. Mark [Morris] really likes you."

During the meeting, Cattoor plainly stated, "You're not guaranteed to get this position." The two men also discussed the application process and that the CTO position would be posted externally but not internally.

In April 2013, Aulick formally interviewed for the CTO position with Cattoor and Turner. The three men spent over two hours discussing Aulick's rèsumè and accomplishments. He was then told that he would have a future interview with Morris, and most likely another one with Michael Paxton, the sole member of Skybridge's advisory board. Some weeks later, Cattoor said that Aulick "would be one of the two that [he] would talk to Morris about."

In May 2013, Aulick informed Cattoor that the IT issues between Skybridge and Four Corners had been resolved. Also in May, Brady introduced Bruce Whitmore to Skybridge as a candidate for the CTO position.

Whitmore, then 50, was a former top-level IT manager who had most recently served as director of operations and chief information officer (CIO) consultant for a private accounting and wealth management firm. He also previously had worked as senior director of infrastructure of for Carlson Companies' call center. He had a college degree in strategic management of information technology and several professional certificates. He also served in the U.S. Air Force for 11 years.

Whitmore interviewed separately with Cattoor, Morris, and Paxton. One topic discussed was the proposed combination of fulfillment and call center IT. He related his experience at Carlson, which ran both a fulfillment operation and a call center.

While Whitmore was interviewing for the CTO position, Aulick "was still in the mix" for the position, according to Morris. Paxton, however, never knew that Aulick was a candidate and never interviewed any candidate other than Whitmore for the CTO position. Ultimately, Whitmore was chosen as CTO. Skybridge extended an offer to him in early June, and he accepted shortly thereafter.

Cattoor spoke with Aulick privately in Aulick's office and informed him that Skybridge had made an offer to Whitmore. He intimated that Morris had made the decision because he wanted a "new face." Cattoor repeated the phrase "new face" four times in the conversation, and Aulick came to believe that "new face" related to his age. Cattoor also asked whether Aulick planned to leave the company. Aulick replied, "[N]o, I'm waiting to see what [Whitmore] has in mind and how we could work together."

Later that month, Aulick presented his ideas for a new warehouse management system at a June 2013 company meeting. Morris approached Aulick after his presentation and said he was eager to start on the proposed project. Morris also sent him an e-mail on July 8 repeating the message.

On July 15, Cattoor met with Aulick and informed him that his position had been eliminated. Aulick was 63 years old at the time. Cattoor presented him with an offer of 30 days' pay if he signed a severance agreement within 15 days.

An HR director called Aulick after only nine days and requested that he sign the severance agreement. Aulick refused.

Simultaneously, two other employees were terminated because their positions had been eliminated. Both were over the age of 60. Moreover, the company had terminated a 70-year-old employee in 2012 and replaced him with someone nearly 20 years younger.

Aulick's proposed project was never undertaken. From mid-2013 to mid-2015, Skybridge reduced the size of its IT department from 19 employees to 10 without any meaningful loss of productivity.

It was unclear who at Skybridge made the decision to terminate Aulick. At their depositions, both Morris and Cattoor testified that Whitmore made the recommendation. Whitmore, however, testified that he played no role in Aulick's dismissal, nor did he recommend that Aulick's position be eliminated. In fact, Whitmore was surprised when Cattoor told him that Aulick had been terminated. After their depositions, Morris and Cattoor submitted declarations to the district court announcing that, in fact, the two of them oversaw Aulick's termination.

Aulick remained unemployed. He filed a lawsuit against Skybridge alleging age discrimination along with other claims. The district court dismissed all of his claims. He appealed the dismissal of the age discrimination claim.

8th Circuit's opinion: direct evidence

On appeal, Aulick alleged two adverse employment decisions: (1) Skybridge's hiring of Whitmore rather than him, and (2) his termination. He claimed those decisions were motivated by his age in violation of the federal Age Discrimination in Employment Act (ADEA). In an effort to have a more employee-friendly standard applied to his case, he argued that Cattoor's repeated statement that Morris was looking for a "new face" constituted direct evidence of age discrimination.

The court explained that direct evidence shows a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action. As an example, a decision maker's remark that "'women were the worst thing' that had happened to the company" was sufficient direct evidence of sex discrimination, but stray remarks in the workplace, statements by non-decision makers, or statements by decision makers unrelated to the decision process don't constitute direct evidence. Additionally, direct evidence doesn't include statements by decision makers that are facially and contextually neutral.

The 8th Circuit held that the comment about a "new face" was facially and contextually neutral when made to Aulick and that no reasonable fact finder could hold otherwise.

Indirect evidence

The court explained that when an employee such as Aulick offers circumstantial evidence of illicit discrimination, the burden-shifting analysis set out by the U.S. Supreme Court case *McDonnell Douglas Corp. v. Green* is used. Under *McDonnell Douglas*, the employee must first establish a *prima facie,* or minimally sufficient, case of discrimination. If the employee succeeds, the employer must articulate a legitimate nondiscriminatory reason for the adverse employment action. If the employer meets this burden, then the employee must prove that the legitimate reasons offered by the employer were not its true reasons, but were a pretext (excuse) for discrimination.

To establish his initial burden, Aulick had to show he:

- Was at least 40 years old;
- Was qualified for the position;
- Suffered an adverse employment action; and
- Was rejected for someone sufficiently younger to permit an inference of age discrimination.

The court conceded that the first three elements were easily met. Aulick was 63 years old when he was terminated. He was qualified for the CTO position. He wasn't selected for promotion and was ultimately terminated. The parties debated whether the 13-year age difference between Aulick and Whitmore permitted an inference of age discrimination. However, the 8th Circuit assumed (for purposes of simplifying the analysis) without deciding that he established his initial burden for age discrimination.

According to the appeals court, Skybridge articulated legitimate nondiscriminatory reasons for selecting Whitmore over Aulick for the CTO position and for ultimately terminating Aulick. Whitmore had experience and qualifications better suited for the CTO position. Unlike Aulick, Whitmore had experience with both call center and fulfillment businesses. Aulick had experience with a fulfillment business only, and that business accounted for less than a quarter of Skybridge's overall business. And the decision to eliminate Aulick's position was based on an independent audit recommending the centralization of Skybridge's IT departments. Thus, Aulick's position as IT director of fulfillment became superfluous.

The burden then shifted back to Aulick to show the reasons offered by Skybridge were in fact pretext for age discrimination. To meet this burden, an employee may show that the employer's explanation is unworthy of credence because it has no basis in fact. Alternatively, he may show pretext by persuading the court that a prohibited reason more likely motivated the employer.

Aulick argued that Skybridge's inability to identify who made the decision to terminate him amounted to pretext. The 8th Circuit noted that substantial changes over time in the employer's proffered reason for its employment decision do support a finding of pretext. As Aulick correctly pointed out, Skybridge and its executives had given varying and contradictory statements as to who fired him. In their deposition testimonies, both Cattoor and Morris claimed Whitmore made the decision, but Whitmore testified that he had nothing to do with it. And Cattoor and Morris subsequently submitted declarations explaining that they oversaw the termination decision.

However, according to the appeals court, no reasonable juror could infer pretext from the facts because there had been no substantial change in the reason given for Aulick's termination. His argument centered on the issue of *who* made the decision to terminate him, but the analysis at the pretext stage revolves around *why* an employment decision was made.

The reasons given for the employment decisions remained constant. Skybridge's proffered reasons for hiring Whitmore instead of Aulick were based on undisputed fact and were worthy of credence. Aulick countered that his advanced degree and professional certificates made him a more qualified candidate than Whitmore. But the court stated that it wasn't a super-personnel department reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination.

Nor did the court believe that Aulick could show that age more likely motivated Skybridge's employment decisions. Aulick asserted that Skybridge always intended for Whitmore to receive the CTO position, so the interview process was predetermined. But the company wasn't even aware of Whitmore until May 2013, after Cattoor first approached Aulick about his interest in the position.

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Aulick also mentioned that Skybridge fired him and three other employees over age 60 in the same general time period. In fact, he alleged that all Skybridge employees in Minnesota over age 60 were terminated. The facts of the case, however, didn't support his last allegation. Instead, the court determined that the record showed Skybridge terminated Aulick's position because of an independent audit, not animus. The record also showed that Morris had hired three new executives over the age of 57 in the two years before Aulick's termination, further undercutting any claim of age discrimination.

In his last attempt to show prejudice, Aulick argued that the conflicting opinions on his work performance were evidence of pretext. He directed the court to Cattoor's negative view of his work in the September 2012 memorandum as compared to Cattoor's positive comments to him while encouraging him to stay and apply for the CTO position. The court explained that charges of poor performance, when offered as a nondiscriminatory reason for an adverse employment action, may constitute pretext when compared to previously positive performance reviews. But here, the court reasoned, Skybridge never offered poor performance as a reason for hiring Whitmore or terminating Aulick. As a result, Aulick's argument failed.

Accordingly, the 8th Circuit affirmed the district court's ruling on Aulick's age discrimination claim in favor of Skybridge.

Bottom line

Even though inconsistency in an employer's reasons for terminating an employee may serve as evidence that the employer isn't credible and the reason for the termination is a pretext, the employer's contradictions about who made the decision to terminate won't serve as evidence that the employer's reason for the termination was pretextual.

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NLRB UPDATE ONLINE

The NLRB's report on union activity in Region 18 is available online at www.HRHero.com, the website for *Arkansas Employment Law Letter*. As a newsletter subscriber, you must first log in on the homepage and then scroll down to the link for "ARKANSAS UNION ACTIVITY." Need help? Call customer service at 800-274-6774.

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