Cullen | Dykman

Employers: Telling Your Employee to "Hang Up [THEIR] [ ] Superman Cape" May Result in a Successful Age Discrimination Claim

October 25, 2013

In reversing the District Court decision, the Eighth Circuit found that a supervisor's disparaging comments to an older employee was enough to establish a prima facie case that the employee was terminated because of his age. In this case, *Johnson v. Securitas Security Services USA, Inc*. No. 12-2129 (8th Cir. Aug. 26, 2013), 76 year old, Carlyn Johnson, was a former security guard employed by the defendant-employer. In support of Johnson's termination, the employer argued that Johnson was terminated not because of his age, but rather, for allegedly leaving his post shortly after colliding with a non-occupied parked vehicle during his shift. Upon hearing Johnson's version of the facts, the Eighth Circuit reversed the District Court's grant of summary judgment and ruled that Johnson was terminated because of his age.

In making his case, Johnson provided the Court with evidence that Johnson's Supervisor made a series of age-related comments to Johnson that would demonstrate age animus. In particular, Johnson alleged that his Supervisor told that Johnson that he "needed to hang up his Superman cape," and that Johnson was "too old to be working" and should retire. Johnson also alleged that the Supervisor would compare Johnson to the Supervisor's recently retired 86 year old father.

Upon review, the District Court found that these types of "comments were stray remarks, remote in time, and unrelated to the decision to terminate Johnson." As a result of this determination, the District Court held there was "no material dispute of fact regarding these comments." After the District Court granted the defendant-employer's motion for summary judgment, Johnson appealed.

The Eighth Circuit held that Johnson satisfied all four elements necessary to establish a prima facie case for age discrimination. The four elements Johnson satisfied were: (1) Johnson was over the age of 40 when the allegations took place; (2) Johnson adequately performed his job duties as evidenced by a clean employment history with no record of employment complaints against Johnson that would indicate John's inability to properly perform job duties; (3) Johnson was terminated; and (4) Johnson's age was a contributing factor to his termination.

In order to make a determination of the fourth element, the Eighth Circuit had to first establish there was enough of a connection between Johnson's Supervisor and human resources to find that the Supervisor possessed enough firing power to contribute to Johnson's termination. The defendant-employer argued that the Supervisor's job responsibilities lacked any firing power and therefore his comments could not be used by the

Court to determine if Johnson was terminated because of his age. The Eighth Circuit rejected the Defendant's argument and found that the Supervisor did play a role in Johnson's termination of employment based upon the age related comments the Supervisor made to Johnson. The Eighth Circuit held that when viewing these "facts in a light most favorable to Johnson, a reasonable jury could find [the] [defendant] was motivated to terminate Johnson based on age animus." Therefore, the Court found that the supervisor's age related comments were enough to establish a "prima facie case of age discrimination."

The lesson employers should take away from the Eighth Circuit decision is that employees in supervisory and management roles will be held accountable for the content of their communications to employees. It is therefore irrelevant to ask whether the supervisor in this case made the Superman comment as a joke or in haste. Instead, it is relevant to know that the courts could potentially view such comments as direct evidence of age-discrimination. As evidenced by Eighth Circuit's decision, employers will fare better by keeping the superheroes in the comic books and out of the work place.

If you or your company would like more information on employment law, contact James G. Ryan at jryan@cullenanddykman.com or via his direct line at 516-357-3750.

A special thank you to Melissa Cefalu, a law clerk at Cullen and Dykman, for her assistance with this blog post.