



Weekly Law Resume

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WEEKLY LAW RESUME™

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Summary Judgment is Improper Where Plaintiff Raises Triable Issue that Employer's Reason for Termination Was Pretext for Unlawful Age Discrimination

Christine Earl v. Nielsen Media Research, Inc., et al.

United States Court of Appeals, Ninth Circuit (September 26, 2011)

California's Fair Employment and Housing Act ("FEHA") prohibits employers from discharging or dismissing any employee over forty years old based on the employee's age. In this case, the Ninth Circuit addressed the "similarly situated" standard to evaluate an employee's claim of discriminatory discipline under the *McDonnell Douglas* test.

Christine Earl worked as a recruiter for Nielsen Media Research, Inc. ("Nielsen") for over twelve years after she was hired in 1994 at age forty-seven. In February, 2006, as a result of three violations of Nielsen's policy rules, Ms. Earl was placed on a Developmental Improvement Plan ("DIP"), a non-disciplinary tool used to notify an employee that their performance has fallen below company standards. Ms. Earl's annual performance for the year was favorable, despite the mention of the DIP.

In September, 2006, Ms. Earl was diagnosed with peripheral neuropathy, and informed the company of her condition. In January, 2007, Nielsen terminated Ms. Earl's employment, hiring five new recruiters for her region in the months before and after, four in their twenties and one in their early thirties. Ms. Earl filed suit against Nielsen, alleging, from among other matters, age discrimination. The District Court granted summary judgment to Nielsen on Ms. Earl's age discrimination claim, finding that she failed to produce sufficient evidence to allow a jury to conclude that Nielsen's proffered non-discriminatory reason for termination was pretextual.

The Ninth Circuit reversed in part. As the Ninth Circuit noted, once a plaintiff establishes a prima facie case of

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employment discrimination, the employer must articulate a legitimate, non-discriminatory reason for its actions. Following a legitimate reason, the plaintiff must raise a triable issue that the employer's proffered reason is a pretext for unlawful discrimination.

The Ninth Circuit found that Ms. Earl had established a prima facie case of age discrimination, and that Nielsen had articulated its reason for Ms. Earl's termination that was based on multiple violations of company policy. However, the Ninth Circuit found that Ms. Earl presented evidence raising a triable issue of pretext, noting that younger, similarly situated employees were treated more favorably, and that she was terminated without first being subject to disciplinary action, which deviated from Nielsen's normal procedure. Therefore, summary judgment was improper.

COMMENT

Although an employer may be able to articulate a valid and legitimate reason for an employee's termination, the employee may still be able to establish that the proffered reason is pretext for unlawful discrimination. A plaintiff's burden to raise a triable issue of pretext is not an onerous one. If an employee can show that the employer treated younger, similarly situated employees more favorably, or deviated from its normal disciplinary procedures in dealing with the employee, the employee will likely be able to create a triable issue of pretext.

For a copy of the complete decision see:

[HTTP://WWW.CA9.USCOURTS.GOV/DATASTORE/OPINIONS/2011/09/26/09-17477.PDF](http://www.ca9.uscourts.gov/datastore/opinions/2011/09/26/09-17477.pdf)

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