Bodman PLC | Workplace Law Practice | www.bodmanlaw.com June 1, 2017

MANAGER'S CONVERSATIONS ABOUT RETIREMENT SUPPORTED AN INFERENCE OF AGE DISCRIMINATION

By: Karen L. Piper, Member, Workplace Law Practice Group

Gerard Howley worked as a Dispatch Manager for Federal Express Corporation ("FedEx"). He was discharged in November 2013, consistent with FedEx's Acceptable Conduct Policy, after he received three disciplinary letters in nine months. Howley sued for age discrimination under Michigan's Elliott-Larsen Civil Rights Act. Following the close of discovery, the federal district court in Detroit dismissed the case. Howley appealed. The Sixth Circuit Court of Appeals reinstated the case. Howley v. Federal Express Corporation, (6th Cir. March 15, 2017).

The appeals court reviewed Howley's work record and characterized the circumstances surrounding his discharge as "suspicious." First, Howley had worked for FedEx for 21 years without any disciplinary action. Second, Howley had received three disciplinary letters in a nine-month period for conduct the court deemed "fairly innocuous." The first disciplinary letter was for inappropriate language. Howley submitted evidence that younger employees, and even Howley's manager, used inappropriate language "all the time" but were not disciplined. The second and third disciplinary letters were for failing to respond to one email from a subordinate employee requesting FMLA leave for a medical appointment and declining another employee's request that he speak to a customer about a lost package. Howley offered evidence that no other employee, including younger employees, had ever been disciplined for these specific behaviors. The court posited that none of these three disciplinary letters even warranted discipline.

Howley also produced evidence that his manager had discussed retirement several times. Specifically, the manager: 1) asked Howley how much money he made and expressed surprise about the length of his employment; 2) asked employees in Howley's work group about their retirement plans and asked why they were still working; and 3) expressed concern that employees were "being old and not keeping up with technology" and "still around and should have been retired." The court observed that under "normal circumstances," these remarks would be viewed as "simply too attenuated from the termination process to constitute direct evidence of discrimination;" and "statements about the impending retirement of employees" by themselves, generally are "not sufficient to constitute direct evidence of discrimination." However, in this case these statements, coupled with the suspicious circumstances of Howley's discharge, "gave rise to a negative inference of age discrimination." The court reinstated Howley's claim.

Whenever a long-term employee with a good work record begins to have multiple performance or misconduct issues in a relatively short amount of time, the employer should carefully review the circumstances before terminating the employee. In this case, a manager's conversations with the employee about retirement took on new meaning in court in light of the employee's multiple disciplinary actions in a relatively short period of time.

About the Author. Karen L. Piper *represents and counsels employers on employment law issues. She has conducted a number of employment investigations and training seminars for a variety of clients and has also successfully defended numerous discrimination and wrongful discharge cases at the administrative, trial, and appellate levels. Karen is a frequent speaker and writer for national and local industry associations.*

Bodman's Workplace Law Practice Group:

Maureen Rouse-Ayoub
Co-chair, Workplace Law
313.392.1058
mrouse-ayoub@bodmanlaw.com

Aaron D. Graves
Co-chair, Workplace Law
313.392.1075
agraves@bodmanlaw.com

Rhonda H. Armstrong
248.743.6048
rarmstrong@bodmanlaw.com

John C. Cashen
248.743.6077
jcashen@bodmanlaw.com

Steven J. Fishman
248.743.6070
sfishman@bodmanlaw.com

Jason E. LaBelle
313.393.7578
jlabelle@bodmanlaw.com

Danielle C. Lester
248.743.6078
dlester@bodmanlaw.com

Christopher P. Mazzoli
248.743.6066
cmazzoli@bodmanlaw.com

Karen L. Piper
248.743.6025
kpiper@bodmanlaw.com

Charles M. Russman
248.743.6039
crussman@bodmanlaw.com

Donald H. Scharg
248.743.6024
dscharg@bodmanlaw.com

David B. Walters
248.743.6052
dwalters@bodmanlaw.com