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EMPLOYMENT LAW

Employee Straining Company's Human Resources Can Be Terminated

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Special to the Legal

Sometimes an employer just reaches a breaking point with an employee and the combination of marginal performance, disruptive behavior and being an overall strain on resources leads to termination. A striking example of this explanation as a legitimate basis to end an individual's employment is the recent case of *DiFrancesco v. A-G Administrators*, No. 13-4284, 2014 U.S. Dist. LEXIS 124263 (E.D. Pa. Sept. 4, 2014) (Quinones Alejandro, J.).

Maria DiFrancesco was hired as a senior staff accountant by A-G Administrators Inc., a third-party insurer, in December 2009. Although she was 55 at the time of her hiring, she did not believe that anyone at the company knew her age.

A 'LARGER-THAN-LIFE STYLE'

DiFrancesco was described by her employer as having a "larger-than-life style." Examples of this were her penchant for speaking loudly and singing in the workplace, taking personal phone calls so that co-workers could hear and referring to her co-workers as "kiddies." DiFrancesco had what was described as a "messy" personal life that she shared with her co-workers. Furthermore, DiFrancesco's attendance was often unreliable, as she would take personal days on short notice and she was described as being "perpetually late" for work, which she coupled with (as the company's owner testified) "a loud and inappropriate voice when entering the office which essentially announces to everyone already at work that she was late without repercussion," according to the opinion.

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DiFrancesco also made significant mistakes at work, including incorrectly transferring funds earmarked for one account to another, which was compounded by the fact that DiFrancesco was out of the office the day after making this error, with no one in the office who could identify the source of the mistake, the opinion said.

STRAIN ON HUMAN RESOURCES

Although A-G is a small company without a distinct human resources department, DiFrancesco's behavior created a strain on the co-owner designated with the HR function. A few weeks before her termination, one of the owners sent an email to the other, stating: "We absolutely need to find a new accountant. Some of the obvious reasons: perpetual tardiness, unpredictable schedule and abuse of our lenience and PTO; unwillingness to admit mistakes and regularly making them and

either lack of awareness of her surroundings or just plain inconsideration for others in the workplace." DiFrancesco was terminated Nov. 17, 2011, just over two years after she was hired.

DIRECT EVIDENCE REJECTED

DiFrancesco brought suit against A-G, claiming that she had been discriminated against on the basis of her age. Her principal evidence of discrimination focused on her claim that she had been asked to disclose her date of birth four times (after previously not disclosing it at the time of her hiring). She also claimed that one of the co-owners referred to her as "grandma" and, on one occasion, as an "old hillbilly," according to the opinion.

The court rejected these allegations as "direct evidence" of discrimination. Initially, the company explained that it needed her age for its 401(k) plan (and DiFrancesco said she thought that the owner asking for her age had not listened to her the first three times he asked). DiFrancesco offered no evidence that this was not the real reason for the requests. As for the "old hillbilly" comment, the court discounted this allegation, finding that "there is no averment in the complaint containing this phrase nor are there any witnesses to this comment being made." Implicit in this finding is that DiFrancesco's personal claim that the comment was made, by itself, was not sufficient to support a finding of direct evidence. There was no finding as to whether the comment would have been sufficient to constitute such evidence had it occurred.

The "grandma" comment was also rejected as it was made in the context of a discussion with DiFrancesco about why it was inappropriate for her to call her co-workers "kids" or "kiddies." Furthermore, the court found that these comments were not related to the actual termination decision and, therefore, in accord with *Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 983 F.2d 509 (Third Cir. 1992), should not be "given great weight."

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NO PRETEXT FOUND

DiFrancesco's attempt to establish pretext under the *McDonnell Douglas* indirect theory—from *McDonnell Douglas v. Green*, 411 U.S. 792 (1973)—met with no greater success. The court found that she was unable to present evidence that the company's "specific examples of unreliability ... were merely a pretext for age discrimination. A company has a right to expect the attendance of its employees to do their jobs, and that their work will be completed."

With respect to A-G's explanation that DiFrancesco's "incompetency for accounting" was a reason for termination, the court found that DiFrancesco's attempts to rebut or minimize the specific errors referenced did not "establish that [the company's] reasons are a pretext to discriminate against her because of her age."

Although DiFrancesco claimed that her "personal life had always been in order," she subsequently admitted in testimony that this statement "is probably not as accurate as it could be." This, along with contemporaneous documentation of her "unruly and condescending attitude in the workplace," supported the company's contentions that DiFrancesco's "behavior at work was disruptive." There was no evidence to the contrary.

The combination of these factors led to the owners' frustration with DiFrancesco and ultimately their decision to end her employment. The court found there to be no evidence that the factors cited by the company "were merely pretexts for unlawful discrimination." •