

Fifth Circuit Rules Age-Related Comments Must Be Specific to Defeat Summary Judgment

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The Fifth Circuit Court of Appeals recently issued a ruling concerning the discharge of Michael Harris from his position with the City of Schertz as the city marshal. In doing so, the Fifth Circuit gave a bit more clarity on the situations in which comments made by an employer or agent of an employer amount to discriminatory pretext. The court found that those comments must be specific rather than general or suggestive to defeat summary judgment. In this case, comments made in testimony by the city's agents or employees were not specific enough to show pretext and defeat the city's motion for summary judgment.

Harris' duties as city marshal included supervising the Animal Services department, which Shanna O'Brien oversaw. At some point in 2016, O'Brien complained to Harris about the conduct of another employee, David Taylor. Initially, Harris decided to attempt to resolve the issue without involving the human resources (HR) department or the city attorney, and he collected statements from both parties. The city then initiated an investigation into the allegations and collected statements from other employees. Although no formal complaint was ever made against Harris, multiple employees told investigators that Harris was present (and participatory) when sexually and racially inappropriate language was used in the workplace. O'Brien was the only employee who lodged a formal complaint against Harris. O'Brien's complaint was that Harris told her not to go to HR with any reports of misconduct. Statements from employees also suggested that Harris had allegedly admitted to another employee that he was watching O'Brien to see if she was talking to HR. Prior to this investigation, Harris had not been cited for any disciplinary issues.

At the end of the investigation, the city decided to demote O'Brien and Harris on the basis of the inappropriate work environment under their supervision. O'Brien resigned. Unrelated, the city then issued a second notice of complaint to Harris in May 2017 for allegedly placing a concealed camera in the Animal Control department. The city fired Harris on June 2, 2017.

After unsuccessfully appealing the termination decision to the city manager, Harris filed a charge with the U.S. Equal Employment Opportunity Commission and an eventual lawsuit against the city, alleging unlawful discrimination on the basis of age in violation of the Age Discrimination in Employment Act (ADEA) of 1967 and sex discrimination in violation of Title VII of the Civil Rights Act of 1964. The district court granted summary judgment in favor of the City of Schertz on both counts.

City representatives testified that the reason for discharging Harris was that with its growing size, the city needed “a higher level of sophistication and a higher level of leadership,” which were outside the scope of Harris’s abilities. Testimony from the city’s executive director of operations that Harris “had not been adequately prepared or mentored,” that he had not been “taught to be a leader” or “to dive into difficult problems,” and that he had been left to advance “on his own” led the district court to find the city’s evidence of having fired Harris because of the hidden camera “unworthy of credence.” Nevertheless, the district court found that Harris had not shown the “critical but-for causation” between Harris’s age and the termination of his employment, which was necessary to survive summary judgment. Harris appealed the judgment as to his age-based discrimination claim to the U.S. Court of Appeals for the Fifth Circuit.

The Fifth Circuit’s Analysis

The Fifth Circuit’s review of the record noted that it was “not certain the district court should have rejected” the city’s reasons for firing Harris. However, the Fifth Circuit did agree with the district court that Harris had not shown that the city had fired him because of his age. The Fifth Circuit noted that the fact that the city considered Harris to be unqualified for his growing responsibilities provided insufficient evidence to infer that the city thought Harris was old and slow. According to the Fifth Circuit, the underlying turmoil within Harris’s department showed that he was not adequately managing his duties. Most importantly, the comments that the responsibilities assigned to Harris were too great were not age-specific enough, according to the court. There was no evidence before the court that the comments made were age-specific enough to survive summary judgment and a reasonable fact finder would not be justified to infer that Harris was fired because of his age, the court concluded.

Key Takeaways

The Fifth Circuit made it clear that comments by a decision-maker that are suggestive of age bias need to be more age specific than what was present in this case. Comments that Harris was not capable of the responsibilities assigned to him in a rapidly growing city were not sufficiently suggestive of age bias, in the opinion of the Fifth Circuit, to allow a fact finder to infer that the comments—and the employment termination decision—were due to Harris’s age.

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