



Consideration of Employees' Projected Retirement Dates Was Evidence of Age Bias

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An employer's promotion process that weeded out an older, well-qualified applicant and resulted in the selection of the youngest applicant was possibly influenced by information concerning employees' projected retirement dates and ages, warranting a jury trial on the issue of age discrimination, the 9th U.S. Circuit Court of Appeals held.

In 2005, Devon Scott Shelly, a 54-year-old assistant chief of contracting for the Army Corps of Engineers, sought a promotion to a chief of contracting position at the corps' Kansas City district office. The corps appointed a five-member panel to select a 120-day temporary chief who would be replaced by the "permanent" chief of contracting at the end of a more formal review process. Shelly applied for both the temporary and permanent positions without success.

During the selection process, two panel members requested and received information regarding the projected retirement dates for employees in the corps' various districts and divisions.

With a master's degree in business, 29 years of experience in contracting (26 of which were with the corps) and numerous awards for his work, Shelly was well-qualified. Yet, he was not granted an interview for the permanent position. Ultimately, the permanent chief position was awarded to the youngest of the six finalists, 42-year-old Vince Marsh, who had 20 years of experience in contracting, but less than two years of employment with the corps.

The court found that the two panel members' receipt of information about retirement dates constituted direct evidence of age discrimination. It suggested that they knew the candidates' ages, considered the ages when making their decisions and could have influenced the other three panel members. In addition, the court found indirect evidence of age discrimination given Shelly's superior qualifications as compared to Marsh. It also gave no weight to the fact that the other finalists were close in age to Shelly as the court said those finalists could have been stacked by the panel in an attempt to partially mask their selection of the significantly younger applicant. Thus, the court concluded that the issue of age discrimination should proceed to a jury trial.

Shelley v. Geren, 9th Cir., No. 10-35014 (Jan. 12, 2012).

Professional Pointer: Employers should avoid asking questions, making comments, writing notes or otherwise using information concerning workers' ages or proximity to retirement when making personnel decisions.

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