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## Age Bias Claim Should Go to Jury

11/5/2012

By Michael A. Warner, Jr. and Lindsey M. Marcus

A fired manager's age discrimination claim should be submitted to a jury for decision where the manager showed that certain problems for which he was disciplined or terminated were not clearly attributable to him, and his significantly younger replacement was not disciplined for similar problems, the 1st U.S. Circuit Court of Appeals ruled.

Hernán Acevedo-Parrilla, 56, was the maintenance and engineering manager for 11 years at a Novartis Ex-Lax plant in Puerto Rico. For most of his career, he received positive performance reviews and bonuses, including a \$13,166 bonus in 2006, the year before his termination.

In 2003 Ex-Lax hired a new site manager, Carlos Ceinos, who supervised all department managers, including Acevedo. Ceinos asked the human resources manager to investigate the retirement plans of employees who had reached retirement age. Although no employees were pressured to retire, at least one employee who chose not to retire was effectively demoted.

In 2004 Ex-Lax identified several problems in Acevedo's department, including bacteria in two lots of the company's product, rodents in the plant and a packaging process deviation. Internal investigations did not clearly find Acevedo at fault for two of these problems, but Ceinos held Acevedo responsible based on Acevedo's general job duties and responsibilities and gave him a low rating in his annual performance review. As a result, Ex-Lax placed Acevedo on a performance improvement plan (PIP), which he completed successfully in 2005.

In 2006 Ceinos held Acevedo responsible for several other incidents, including a change in equipment that contaminated water used for production, the contamination of a batch of product by pest-control fumigating and a general lack of cleanliness in the areas under Acevedo's supervision. However, the evidence failed to establish that Acevedo was clearly at fault for two of these incidents, and in fact was on vacation when one incident occurred.

On two occasions within six months of Acevedo's termination, Ceinos allegedly told Acevedo that "the main problem" at the plant were the employees "who had been in the company for a long time" because those persons "were not performing." Ex-Lax terminated Acevedo's employment in February 2007 for poor performance, and hired a 34-year-old to replace him. In 2007 and 2008 the company identified several problems similar to those identified during Acevedo's tenure, but Ceinos did not hold Acevedo's replacement responsible for these issues.

The district court granted summary judgment for Ex-Lax, and the 1st Circuit reversed, concluding that a reasonable jury could find that Ex-Lax's stated reasons for terminating Acevedo were a pretext for discrimination. First, in addition to the lack of clear fault on Acevedo's part for four of the incidents for which he was disciplined or terminated, Ceinos testified inconsistently as to whether he believed that Acevedo was to blame for two of the incidents. Second, Acevedo's successful completion of the PIP, positive ratings in 2005 and bonus in 2006 were incongruous with the termination decision. Third, Ex-Lax inexplicably did not follow its internal procedures for terminating Acevedo, namely, requiring Ceinos to document the reasons for termination. This deviation suggested that the reasons Ex-Lax gave for firing Acevedo were pretexts for discrimination.

Finally, the court also found that Acevedo had presented evidence of Ex-Lax's discriminatory intent through Ceinos' comments regarding long-time employees not performing; Ceinos' failure to reprimand Acevedo's younger replacement for similar problems to those during Acevedo's tenure; evidence that 15 of 17 employees who had been fired under Ceinos were over age 40; and the investigations of retirement-eligible employees. Taken together, a jury could find that these facts discredited the reasons Ex-Lax offered for terminating Acevedo.

*Acevedo-Parrilla v. Novartis Ex-Lax, Inc.*, 1st Cir., No. 10-2276 (Oct. 10, 2012).

**Professional Pointer:** While discrimination cases are necessarily fact-specific, courts may be suspicious of situations where a long-time employee who has received positive reviews is suddenly performing below expectations when a new manager arrives. While a new manager is free to set or even change expectations for legitimate business reasons, any unexplained dramatic changes or inconsistent application of the new expectations may create an inference of unlawful bias. This case is a reminder of the importance of carefully documenting all employee performance issues and treating all employees consistently.

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