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Fifth Circuit Permits Plaintiff to Advance Hostile Work Environment Claim Based on Age Discrimination Under the ADEA

By Marcie B. Cornfield, Esq.

"Old man," "Pops," "Old mother*****." These were the names that Plaintiff Milan Dediol ("Mr. Dediol") was alleged to have been called on a daily basis for the two months leading up to the end of his employment. In *Dediol v. Best Chevrolet*, Case No. 10-30767, 2011 WL 4011079 (5th Cir., Sept. 12, 2011), Mr. Dediol alleged that his supervisor, Donald Clay ("Mr. Clay"), began calling him such names after he requested leave to volunteer at a church event. While Mr. Dediol originally received permission to attend the church event from the assistant manager, Mr. Clay revoked the privilege, stating, "You old mother*****, you are not going over there tomorrow."

This occurred on July 3, 2007, and after that time, Mr. Dediol alleged that he was called "Old man," "Pops" and "Old mother*****" up to a half dozen times a day. When Mr. Dediol requested a transfer to move to the New Car Department, Mr. Clay allegedly denied the transfer, stating, "Get your old f***ing a** over here. You are not going to work with new cars." Mr. Clay also allegedly provoked fights with Mr. Dediol and made comments about Mr. Clay's religious beliefs.

The tension escalated and came to a head during on office meeting on August 29, 2007. On that day, Mr. Clay allegedly proclaimed "I am going to beat the 'F' out of you" and "charged" towards Mr. Dediol in front of nine or ten other employees. Dediol worked the remainder of the day, but the next day, he stated, "I cannot work under these conditions - you are good people, but I

cannot work under these conditions."

On August 22, 2008, Mr. Dediol filed suit in the Eastern District of Louisiana. The allegations included hostile work environment based on age, harassment based on religion, and constructive discharge. Best Chevrolet filed a motion for summary judgment, which the district court granted. Mr. Dediol then appealed to the Fifth Circuit Court of Appeals (which covers Louisiana, Mississippi, and Texas).

The Fifth Circuit Court of Appeals reversed the district court's grant of summary judgment for the employer. The Fifth Circuit looked to the Sixth Circuit case of *Crawford v. Medina General Hospital*, 96 F.3d 830, 834-835 (6th Cir. 1996), and noted that "at least one sister circuit has explicitly applied Title VII to a hostile work environment cause of action under the ADEA." The Fifth Circuit went on to hold that a plaintiff may assert a hostile work environment claim based on age discrimination under the ADEA in the Fifth Circuit, holding that "Clay's repeated profane references to Dediol, and the strident age-related comments about Dediol used by Clay on almost a daily basis within the work setting, are sufficient to create a genuine issue of material fact concerning Dediol's ADEA-based claim for hostile work environment discrimination.

To many employers, this decision comes as no surprise. Harassment comes in all shapes and forms. It is not limited to situations concerning sex or race. Employers can be liable for age discrimination, and these cases are only likely to increase. Many older employees are delaying plans to retire for a variety of reasons. With older workers in the workplace, tensions between younger employees (perhaps jockeying for promotions and advances) and older workers (perhaps occupying the positions of promotion and advancement) are only likely to increase. Younger employees may think that referring to someone as "pops" or "old fogey" is an innocent joke and not something that could rise to an actionable level of harassment. This case serves as an important reminder for the steps to take when drafting and implementing a harassment policy. Employers should consider the following:

- Ensure that your harassment policy clarifies that harassment based on any protected category, including age, is prohibited.
- Include specific examples within your harassment policy of the types of behavior prohibited. Your policy could specifically state that name calling on any basis is prohibited and could even cite the use of the words "pops," "old man," "old fogey," etc., as an example of behavior which is prohibited.
- Ensure that your policy includes mechanisms for lodging complaints and that all complaints are investigated. Employees must know that even what appears to be a harmless joke could be considered harassing behavior.
- Consider prohibiting all sorts of obscenities in your harassment policy. So often, we see the example of a person who swears and uses inappropriate language in the workplace.

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Possibly, the case described above could have had a different outcome if Mr. Clay referred to Mr. Dediol as "mother*****" instead of "old mother*****." However, it is possible that the court could have felt that just the use of "mother*****," given the constant references to Mr. Dediol's age, was part of the hostile environment. For employers, erring on the side of caution may be the best course of action.

- Prohibit violent acts, not only in your workplace violence policy but also in your harassment policy. Your harassment policy could specifically state that intimidating or threatening behavior or remarks, violence, or threat of violence is prohibited. This would provide you, the employer, with an additional basis for discipline and or termination of employment.
- Be consistent in enforcing your policy. Do not brush aside comments based on age as something that is a mere joke while taking sexual harassment and racial harassment seriously. So often, we think of harassment as either sexual harassment or a racial epithet. As this case shows, that is not the case.

There is a fine line between a jovial workplace where familiarity breeds coarser language and lewder humor and one that lends itself to liability. Of course, employers do not want to prohibit all behavior to the point where someone cannot even say, "Gosh, I hurt my neck. I am getting old!" However, the fact is that age harassment can create liability. Be alert and aware of tensions in the workplace between employees, and take disciplinary action when necessary.

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