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## The GSH 60-Second Memo

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### Get It Right the First Time

By Stephen L. Knowles

You've no doubt heard the admonition to carpenters: "Measure twice, cut once." Similar advice applies to managers making employment decisions: "Make sure you have a legitimate reason for the decision from the start." The recent case of *Jones v. National American University*, 608 F.3d 1039 (8th Cir. 2010), illustrates the importance of getting it right the first time.

#### Background of the *Jones* Case

Plaintiff Kathy Jones was hired in 1998 by defendant National American University ("NAU") as a part-time corporate liaison at NAU's campus in Rapid City, South Dakota. She became a full-time admissions representative later in the year. In February 2004, Jones applied for the position of director of admissions. She was 56 years old at the time.

NAU appointed a four-person committee to make the hiring decision. Following telephone interviews, the committee interviewed three applicants in person, including Jones. After the in-person interviews, the committee offered the position to each of the two other candidates, in turn. Both declined. Rather than offering the job to Jones, the committee decided to expand the search. NAU's president asked Jones to serve as director of admissions on an interim basis.

As interim director, Jones was called upon to interview applicants for admission representative jobs. NAU's president also participated in these interviews. According to Jones' subsequent testimony, after interviewing an applicant in his mid-50s, the president commented, "I'm not sure we want a grandpa working with our high school students." Jones thought the remark was discriminatory in nature, but did not immediately report it.

One of the candidates interviewed for an admissions representative job was Angela Beck, who was then 34 years old. Beck had been an associate hospital administrator with the U.S. Army. The president offered Beck an admissions representative job, but Beck declined because the salary was too low. The president then arranged for the hiring committee to interview Beck for the director-of-admissions job. Beck was offered the job after the interview, and she accepted.

Upon learning that Beck had been offered the director position, Jones submitted her resignation to NAU's president. Jones subsequently testified that the president told her that while she would have been the better short-term choice to be director of admissions, Beck was the better long-term choice. According to Jones, she believed the president was referring to Beck's age, saying in effect that Beck would be able to work in the position longer than Jones.

Jones then filed an age discrimination charge with the Equal Employment Opportunity Commission. She alleged that NAU had failed to promote her to the director-of-admissions position because of her age, in violation of the Age Discrimination in Employment Act ("ADEA"). NAU filed a position statement asserting that Jones had not been promoted because of performance deficiencies.

After receiving a right-to-sue notice from the EEOC, Jones filed suit against NAU. She claimed that NAU had failed to promote her because of her age, and that her rejection for the admissions director job constituted a constructive discharge. The district court granted NAU summary judgment on the constructive discharge claim but allowed the non-promotion claim to proceed to trial before a jury. At trial, NAU presented evidence to the effect that Jones had not been promoted because she lacked management experience. Jones argued that the real reason for her rejection was her age, and that her claimed lack of management experience was merely a pretext.

The jury found in favor of Jones, determining that NAU had failed to promote her due to intentional age discrimination. She was awarded \$17,565 in compensatory damages, which was doubled under the ADEA because the discrimination was intentional. She was also awarded costs and attorneys' fees. NAU appealed.

#### Pretext Analysis

The Court of Appeals for the Eighth Circuit affirmed the judgment, ruling in Jones' favor on a variety of evidentiary issues, including the issue of pretext.

The Eighth Circuit held that Jones had presented sufficient evidence for the jury to conclude that NAU's reason for not promoting her was not the real reason. Jones showed that NAU's reason for her non-promotion had changed over time. NAU had asserted in its position statement filed with the EEOC that Jones had not been promoted because of performance deficiencies. At trial, however, NAU did not present evidence of any performance deficiencies. Rather, NAU claimed the primary reason for not

selecting Jones was her lack of experience with management.

In affirming the judgment, the court of appeals noted that Jones' evidence at trial showed she was the only candidate with recruiting experience and that Beck (the successful candidate) lacked the extensive management experience members of the hiring committee said they were seeking. Further, Jones established that she had received positive performance reviews and got along well with her colleagues. Finally, the court cited the "grandpa" remark by NAU's president, as well as his assertion that Beck was the better "long-term" choice.

#### Lessons for Employers

First, the *Jones* case illustrates the importance of carefully analyzing decisions that will likely disappoint an applicant or employee protected by an anti-discrimination law. Jones was twice rejected when she initially applied for the director-of-admissions position, and then was rejected again when the hiring committee selected Beck, aged 34, after the search was expanded. Jones, who was in her 50s and who had been doing the job on an interim basis, was obviously unhappy with the decision and therefore likely to assert a claim. An employer in a similar situation--regardless of the protected category of the applicant or employee--should anticipate the possibility of a claim and ascertain from the outset that the disappointing decision can legitimately be explained. If any investigation needs to be conducted, it should be done right away, before the decision is made.

Second, if the adverse decision is made and results in the assertion of a claim, the employer must be prepared to marshal its defensive evidence in proceedings with the EEOC or a state agency. Key decision-makers and legal counsel should be involved in the defense at the agency level.

Third, the employer should be consistent in its defense if the case proceeds to court. In the *Jones* case, NAU argued to the EEOC that the non-promotion decision was based on Jones' deficient job performance. However, it did not present any evidence of performance deficiencies at the subsequent trial in federal court. It changed its original defense by asserting that Jones was rejected due to a lack of particular experience. This change supported Jones' pretext argument. To avoid a similar result, an employer should be sure from the start that its reason for an adverse employment decision is not only legitimate, but also that it is supported by factual evidence.

Finally, managers should avoid comments that focus on protected categories when discussing employment-related decisions. Such comments will certainly be used against the employer in any subsequent discrimination claim. In the *Jones* case, the "grandpa" and "better long-term choice" comments did not help NAU's defense, and similar comments should be avoided.

The *Jones* case is an example of what can go wrong in an employment case. To avoid a similar result, managers must think through employment-related decisions to ascertain that they can be

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defended, and must be prepared to present the right defense from the outset. There may not be a second chance. Get it right the first time.

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