JONES WALKER

E*ZINES
November 2003 Vol. 30

Labor Relations and Employment
www.joneswalker.com
labor@joneswalker.com

EXECUTIVES' CARELESS REMARKS COST COMPANY BIG BUCKS

By: Jennifer L. Anderson and Joseph F. Lavigne

Ever say something you regret? Ever wish you could take back your words only moments after uttering them? At least one group of executives probably knows how you feel. This recent age discrimination case is a sobering reminder that careless remarks by upper-level management employees can be interpreted as evidence of unlawful bias and could mean big bucks out of your company's pocket. Protect yourself and your company by reviewing this primer on what not to say and our tips for guarding against similar problems in your workplace.

1. "THIN[NING] THE RANKS" OF OLDER EMPLOYEES

A clothing company that wanted to refashion its image created a retail marketing associate (RMA) program and transferred many duties of its sales associates, 95% of whom were between the ages of 45 to 55, to the RMAs. In contrast to the ages of the sales associates, 95% of the RMAs were in their late 20s or early 30s.

In the years following the announcement of its image make-over, most of the company's approximately 50 new hires in the sales group were younger than its existing workforce - all but one new RMA and all but four new sales associates were less than 40 years of age. The company also discharged nearly 30 sales associates, all of whom were 40 or more years of age.

Jimmy Palasota, a 51-year-old sales associate with 28 years of tenure with the company, was considered an outstanding employee with a record of great customer relations and professionalism. The company lost one of its key accounts, which Palasota serviced and which made up 85% of his commissions. The national sales manager at the time created a new territory to replace the lost account. According to that manager, Palasota was the most qualified for the new territory. However, the manager left the company before the new territory was officially assigned. The task then fell to his replacement and the vice president of sales. They refused to give Palasota the new territory, instead offering him a less lucrative territory or, alternatively, the opportunity to resign and accept a severance package. Palasota refused to resign or accept the severance package as offered.

On the day Palasota declined the severance offer, the vice president sent a memo to four other management employees concerning Palasota and other sales associates who were in "their early fifties or older." The memo

recommended severance packages for all those individuals to "thin the ranks," create "good will," and ease "anxiety of the transition."

One month after the memo was written, the vice president fired Palasota. Palasota was notified in writing that he was "eliminated" due to a "reconfiguration of the sales force." The territory created by the former national sales manager, which he had wanted to assign to Palasota, was given to other sales associates, who were fired a year later and replaced by younger RMAs.

2. "RACE HORSES" v. "PLOW HORSES"

A few months before Palasota's discharge, the president of the company told Palasota that he wanted "race horses," not "plow horses," and that Palasota was from the "old school" of selling. The president also announced in a sales meeting that there was a significant "graying of the sales force." Furthermore, at a sales executive meeting, the national sales manager said: "Hey, fellows, let's face it, we've got an aging, graying sales force out there. Sales are bad, and we've got to figure out a way to get through it."

After his discharge, Palasota sued, claiming the company discriminated against him because of his age. The jury agreed and awarded Palasota more than $800,000. The company asked the federal trial court to disregard the jury verdict and dismiss the case. The trial court concluded that a reasonable jury could not find "without any inferences or presumptions" that age was a determinative factor in Palasota's discharge. Therefore, the trial court vacated the jury award. Palasota appealed to the Fifth Circuit Court of Appeals in New Orleans. *Palasota v. Haggar Clothing Co.*, 2003 U.S. App. LEXIS 18171 (5th Cir. 2003).

3. APPEALS COURT REEXAMINES EXECUTIVES' REMARKS

The appellate court explained that there are two methods of proving a discrimination claim - by direct or circumstantial evidence. Circumstantial evidence is that which requires some inference to conclude that discrimination has occurred. Direct evidence, on the other hand, shows discrimination without any such inference.

The court viewed the vice president's memo recommending that severance packages be created to "thin the ranks" of older employees as direct evidence of age discrimination. Combined with the company's

campaign to present a new, youthful image and statistical evidence of the company's hiring and firing practices, the court concluded a reasonable juror could have found that Palasota was fired because of his age.

The court also determined the remarks made by the company's president and national sales manager should have been considered as evidence of discriminatory intent by the trial court. The court explained that the comments about "race horses instead of plow horses" and the "old school" of selling were made by upper management employees who were in a position to influence the decision to fire Palasota. For all these reasons, the court reinstated the jury verdict for Palasota.

4. DON'T OVERLOOK EEO POLICIES AND PRACTICES WHEN OVERHAULING YOUR IMAGE

If your company is considering an image make-over, don't neglect to audit and reevaluate your human resources policies and practices. This includes not only reviewing your written policies and historical practices, but also training human resources professionals and management about employment rights and responsibilities. Regularly reviewing employment laws and your policies with managers will ensure they understand that discrimination against protected groups is prohibited and how to avoid careless remarks and employment decisions that, while perhaps entirely neutral, may appear to be discriminatory.

Additionally, employers should implement a system of checks and balances to insure that employment decisions are not being made in an arbitrary, inconsistent, or discriminatory manner. For example, requiring all decisions at a certain level to be approved by human resources and/or some other neutral individual could avoid a dispute that might lead to a lawsuit or liability. For example, human resources or a neutral party could compare personnel documentation with the stated reason for a proposed discharge to determine whether there are any inconsistencies that could lead the employee to believe he's being treated unfairly or cause problems if the employee were to challenge the decision in a court of law. Implementing a second level of review, while time-consuming on the front end, could save thousands of dollars if a poor or seemingly unlawful employment decision is averted.

But perhaps the most important lesson to be learned from cases such as this one is that careless remarks by management cannot only offend employees and lead to litigation, they can lead to liability. Human resources

professionals and management must avoid thoughtless comments and ensure that their written and verbal communications, as well as their motives, are neutral. Human resources professionals and outside consultants can provide an invaluable service by reviewing speeches and announcements designed to address groups of employees about reorganizations, workforce reductions, and other transactions that will lead to loss of employment, transfers, or other adverse employment actions.

JONES WALKER

E*ZINES
November 2003 Vol. 30

Labor Relations and Employment
www.joneswalker.com
labor@joneswalker.com

Labor, Employment & Employee Benefits Practice Groups

H. MARK ADAMS[1]
JENNIFER L. ANDERSON
JOHN C. BLACKMAN
TIMOTHY P. BRECHTEL
SUSAN K. CHAMBERS[2]
LAURIE M. CHESS[3]
R. KELLY DONALDSON[4]
JENNIFER A. FAROLDI
REBECCA G. GOTTSEGEN
VIRGINIA WEICHERT GUNDLACH
PAULINE F. HARDIN
CORNELIUS R. HEUSEL
THOMAS P. HUBERT
CLYDE H. JACOB III[5]
AMANDA L. JONES
MARY ELLEN JORDAN
JOSEPH F. LAVIGNE
SIDNEY F. LEWIS V
CHARLOTTE MARQUEZ
EDWARD F. MARTIN
STEPHANIE C. MOORE[6]
MARGARET F. MURPHY
RUDOLPH R. RAMELLI
ANTONIO D. ROBINSON
SHELLEY M. SULLIVAN
JOHN D. WHITE[4]
ROBERT B. WORLEY, JR[7]

[1] Also admitted in Mississippi
[2] Also admitted in West Virginia
[3] Also admitted in Florida
[4] Only admitted in Texas
[5] Also admitted in Virginia
[6] Also admitted in Tennessee
[7] Also admitted in Texas