

# Louisiana Employment Law Letter

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## AGE DISCRIMINATION

### Age-related comments muddy waters of otherwise textbook termination

*Sometimes a company can do everything by the book and still get into trouble — a few stray comments is all it takes. In a recent case, an employee was fired after receiving a poor performance review followed by complaints about his management skills. Sounds legitimate, right? Well, it took a trial court judge and an appeals court to sort through the age-related comments to get to the heart of the matter before concluding the employee wasn't a victim of age discrimination. Could this employer have done anything differently to avoid the expensive lawsuit? We wouldn't be writing about the case if we didn't think you could learn from it, so keep reading.*

#### ***Moving up***

Fifty-two-year-old Kenneth Sandstad began his career with a real estate services company as a sales manager in 1974. Over the next 16 years, he was promoted several times and eventually ascended to the position of eastern division manager.

In 1996, the company designed and implemented a long-term leadership orientation program to integrate younger employees into senior management. The CEO described the plan in a company memo as one to "identify 30-50 younger managers and management candidates to serve as a pool of talent for promotion to senior management over the next 5+ years, ultimately replacing senior management."

#### ***Open mouth; insert foot***

In anticipation of the company's initial public offering, question-and-answer literature about the company was prepared. The literature was distributed during "road shows" — a series of presentations to investors designed to generate interest in the company. During one of the shows, some stock analysts remarked to company representatives that there was "too much gray hair" in senior management. The analysts weren't company employees but, rather, outsiders remarking on their perception of the company. The company's general counsel heard the remarks and commented to other senior managers that something would have to be done to remedy the analysts' perception.

The following year, Sandstad's supervisor moved to a different company division, leaving his position vacant. Instead of promoting Sandstad to the position, however, the CEO selected a 37-year-old. Sandstad's former supervisor told him the CEO had decided to "skip a generation" in selecting his replacement. The supervisor later explained that he meant "generation" in the context of levels of management, not age.

### ***Performance declines***

The next year, the 37-year-old supervisor gave Sandstad a negative performance review. Additionally, two managers who reported directly to Sandstad complained about his management. Finally, a female manager who also reported directly to him filed a lawsuit against the company, alleging he discriminated against her because of her gender.

The company hired an attorney to investigate the female manager's complaint. The attorney interviewed employees in Sandstad's region and reported to the company that they complained about his conduct and management style. The attorney also included in his report his impression that Sandstad was a "bully," was condescending, and wasn't credible during his interview.

While the attorney concluded that Sandstad hadn't discriminated against the female manager, he concluded that his actions with respect to her were inappropriate and placed the company at substantial risk of liability.

### ***You're fired***

After receiving the report, the company's general counsel (who'd heard the stock analysts' "gray hair" remarks) met with senior management and recommended that Sandstad's supervisor fire him.

The supervisor conferred with the legal department and fired Sandstad for poor performance and "lack of confidence in his leadership."

### ***Defending the decision to discharge***

Sandstad sued the company, claiming he had been discriminated against because of his age. His attorneys thought he had a pretty good case. After all, they had evidence of the company's "long term leadership development plan," which was enacted to identify "younger" managers for promotion and to ultimately "replace" senior management. Furthermore, they had the stock analysts' remarks about "too much gray hair" in company management, the CEO's expression of concern about that perception, and the comment by Sandstad's former supervisor about the CEO "skipping a generation" when choosing a younger employee for promotion.

The company, on the other hand, thought it had ample evidence to support its employment decisions and asked the court to dismiss Sandstad's claims. The trial judge agreed and dismissed the case before trial. The U.S. Fifth Circuit Court of Appeals in New Orleans approved the trial court's decision.

### ***Legitimate decisions, not discrimination***

The appellate court didn't think Sandstad's "evidence" proved his allegations of age discrimination. Why? First of all, the court said that the long-term leadership development plan didn't mean that senior managers would be fired to make room for younger trainees. Rather, the

plan's goal was to replace older employees as they retired, changed jobs, or were terminated for performance reasons.

Also, the court explained that the "too much gray hair" comment was made by stock analysts who had no part in the decision to terminate Sandstad — *and they weren't even employed by the company*. Finally, the court observed that the "skipping a generation" comment was made by a supervisor who wasn't responsible for Sandstad's discharge and who explained his comment by stating that he meant "generation" in the context of levels of management seniority, not age.

The court of appeals also concluded that the company had a legitimate, nondiscriminatory reason to fire Sandstad: his management style and the risk created by his conduct toward the female manager under his supervision. The company provided the court with a memo written by Sandstad in which he acknowledged calling in the female manager during her maternity leave to discuss reducing her managerial responsibilities. He also admitted sending her a memo advising of the perception that she was a "mother hen."

Sandstad conceded his awareness that those who reported to him considered him a "micro manager." The company provided the court with memos from managers who reported to him expressing their dissatisfaction with his management style. It also submitted his performance review that was conducted two months before his discharge in which his supervisor expressed concern with the "instability and dissatisfaction" among the managers in his division.

Finally, the company was able to support its decision to fire Sandstad based on the report compiled by the outside attorney who investigated the female manager's complaint. While normally companies would endeavor to keep such information private and protect it from disclosure under the attorney-client privilege or because it contained the attorney's mental impressions, in this case, revealing the attorney's report actually benefited the company. Given all the evidence to support the company's employment decisions, the appellate court agreed with the trial court's dismissal of Sandstad's claim. *Sandstad v. C.B. Richard Ellis*, 2002 U.S. App. LEXIS 22428 (5th Cir., October 28, 2002).

### ***Lessons learned***

In this instance, the employer was able to convince the court that its decisions regarding Sandstad weren't due to age bias. But this case offers some important lessons for employers. Many companies look for a return on their workforce investment by helping qualified employees advance through the ranks into upper management. In this case, the company's use of the word "younger" to describe its leadership program sent the wrong message to the former employee. Carefully review your written policies and programs to make sure your words accurately convey your intention and don't suggest or create the impression that there's an underlying unlawful motive.

The other big hurdles the company faced in this case were the age-related comments — even though the one about "too much gray hair" wasn't made by a company employee. What could you do if faced with a similar situation? If the comments were publicized to your employees, issue a statement or memo disavowing them and restating your commitment to equal employment opportunities for everyone, regardless of age, race, gender, religion, and the like. And remember to train your managers regularly on equal employment opportunity policies and practices and good employee relations. If they're familiar with employment laws and can effectively communicate with their subordinates, they're less likely to say something careless that can lead to a lawsuit.

Finally, you should also consider how your actions before, during, and after your employment decision will appear to a court or jury who may be called on to decide whether they were discriminatory. Proper documentation and consistently applied work rules, policies, and procedures may not always prevent a lawsuit, but they'll certainly help defend against one.

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