

## LABOR & EMPLOYMENT

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# What Did They **Say?**

*Deciphering when remarks are evidence of discriminatory intent is a difficult task.*

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**A** WELL-KNOWN expression says, “If it looks like a duck, quacks like a duck, and swims like a duck, it must be a duck.” One should not be misguided by simply relying upon this proverbial type of analysis when assessing an employer’s exposure in a discrimination case. There are times when a verbal remark looks discriminatory and sounds discriminatory, but does not demonstrate that an employer made an adverse employment decision because of a discriminatory intent. On the other hand, a seemingly neutral remark—for example, that an older employee “works well with senior citizens”—may be admissible evidence of an employer’s discriminatory intent. Courts have characterized remarks that do not directly evidence an employer’s discriminatory intent as “stray remarks.”

Deciphering when a remark is evidence of an employer’s discriminatory intent or when it is merely a stray remark is a difficult undertaking, requiring consideration of the particular facts and circumstances presented.

### ‘Burden-Shifting’ Formula

To establish a prima facie case of discrimination based upon disparate treatment under either Title VII or New York law, a plaintiff must show that he: (1) belonged to a protected class, (2) was qualified for the position he held or sought, and (3) suffered an adverse employment action (4) under circumstances giving rise to an inference of discriminatory motivation. *Terry v. Ashcroft*, 336 F3d 128, 138 (2d Cir. 2003); *Farias v. Instructional Sys., Inc.*, 259 F3d 91, 98 (2d Cir. 2001); *Cruz v. Coach Stores, Inc.*, 202 F3d 560, 565 (2d Cir. 2000).

After a plaintiff has established a prima facie case of

discrimination, the burden of production then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its actions. If the employer does so, the burden shifts back to the plaintiff to prove that the employer’s stated reason is merely pretextual and that discrimination was an actual reason for the adverse employment action. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 US 133, 143 (2000).

The ultimate question is whether the employer intentionally discriminated. Proof that “the employer’s proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff’s proffered reason... is correct.” *Id.* at 147. It is not enough “to disbelieve the employer; the factfinder must believe the plaintiff’s explanation of intentional discrimination.” *Id.* Thus, it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer’s explanation. *Id.* See also *Classic Coach v. Mercado*, 722 NYS2d 551 (2d Dept. 2001) (adopting *Reeves* under New York law).

A verbal remark constitutes evidence of discriminatory motivation when a plaintiff demonstrates that a nexus exists between the purportedly discriminatory

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remark and an employer's adverse employment decision regarding the plaintiff. *Schreiber v. Worldco, LLC*, 324 FSupp2d 512, 518-19 (S.D.N.Y. 2004). However, the mere utterance of another employee's overtly improper remark does not, alone, guarantee that such a remark is admissible evidence of an employer's discriminatory intent. A purportedly discriminatory remark can be a mere stray remark that does not support an inference of discriminatory motivation. *Danzer v. Norden Sys., Inc.*, 151 F3d 50, 56 (2d Cir. 1998).

The relevance of discrimination-related remarks does not depend on their offensiveness, but rather on their tendency to show that the decisionmaker was motivated by assumptions or attitudes relating to the protected class. Indeed, even inoffensive remarks may strongly suggest that discrimination motivated a particular employment action. *Tomassi v. Insignia Fin. Group, Inc.*, 478 F3d 111, 116 (2d Cir. 2007). For example, a supervisor's comment that an older employee was well-suited to work with seniors is not offensive; however, it has a tendency in certain circumstances to show that the supervisor may believe, because of the employee's age, that she was not well-suited to deal with the younger customers. *Id.*

The U.S. Supreme Court addressed the stray remark doctrine in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 US 133, when considering the discriminatory intent of a decisionmaker's own prior remarks which were not related to the decision process. Roger Reeves alleged that he was terminated at age 57 because of age discrimination. Defendant asserted that Mr. Reeves was terminated because of his poor performance. Mr. Reeves testified that his supervisor said that Mr. Reeves: "was so old [he] must have come over on the Mayflower" and "was too damn old to do [his] job." This supervisor subsequently decided to terminate Mr. Reeves' employment.

The U.S. Court of Appeals for the Fifth Circuit found that the supervisor's remarks were stray remarks because Mr. Reeves failed to demonstrate a causal link between the remarks and the subsequent termination decision. However, the U.S. Supreme Court stated that, because of "additional evidence that [the supervisor] was motivated by age-based animus and was principally responsible for [Mr. Reeves'] firing," there was a sufficient basis to find that the employer had discriminated. *Id.* at 151. Thus, a decisionmaker's own prior remarks—even if not made as part of the challenged employment decision—will typically evidence discriminatory motivation.

The U.S. Court of Appeals for the Second

Circuit in *Tomassi v. Insignia Fin. Group, Inc.*, 478 F3d 111, clarified the analytical framework for determining whether a remark supports an inference that the employer intentionally discriminated. First, a court should determine whether the remark is stray. The purpose of describing remarks as stray is to recognize that all comments pertaining to a protected class are not equally probative of discrimination and to explain in generalized terms why the evidence in the particular case is not sufficient. The initial categorization of a remark as being stray does not mean that the remark should merely be disregarded. Second, regardless of whether the remark is deemed stray, the remark is to be examined within the context of the "totality of the circumstances."

### Categorizing a Remark

The Second Circuit applies the following factors to determine whether a comment is a probative statement that evidences an intent to discriminate or whether it is a non-probative stray remark: (1) the position of the person who made the remark, i.e., a decisionmaker, a supervisor, or a low-level co-worker; (2) when the remark was made in relation to the challenged employment decision; (3) the content of the remark, i.e., whether a reasonable juror could view the remark as discriminatory; and (4) the context in which the remark was made, i.e., whether it was related to the decision-making process. See *Minton v. Lenox Hill Hosp.*, 160 FSupp2d 687, 694 (S.D.N.Y. 2001); *Rizzo v. Amerada Hess Corp.*, No. 99-1068, 2000 U.S. Dist. LEXIS 18754, at \*5 (N.D.N.Y. Dec. 28, 2000); *Ruane v. Continental Cas. Co.*, No. 96-7153, 1998 U.S. Dist. LEXIS 8141, at \*8 (S.D.N.Y. June 3, 1998). These factors are widely accepted, having been applied by district courts outside the Second Circuit. See e.g., *Mosberger v. CPG Nutrients*, No. 01-100, 2002 U.S. Dist. LEXIS 22254, at \*7 (W.D. Pa. Sept. 6, 2002).

An employer's discriminatory remark will rise above the level of a stray remark when the statement is: (1) made by the decisionmaker or one whose recommendation is sought by the decisionmaker; (2) related to the specific employment decision challenged; and (3) made close in time to the decision. *Rizzo*, 2000 U.S. Dist. LEXIS 18754. In *Chetal v. BLS Funding Corp.*, No. 05-3014, 2007 U.S. Dist. LEXIS 52058 (E.D.N.Y. July 18, 2007), the district court in the Eastern District of New York found that remarks in which a supervisor frequently called an employee various ethnic names were not merely stray remarks and, instead, served as direct evidence

of discriminatory motivation supporting the employee's race discrimination claim.

Discriminatory comments that are classified as stray remarks generally fall within one of three categories—those made by: (1) a non-decisionmaker; (2) a decisionmaker but is unrelated to the decision process; and (3) a decisionmaker but temporally remote from the adverse employment decision.

### Non-Decisionmaker

In *Seltzer v. Dresdner Kelinwort Wasserstein, Inc.*, 356 FSupp2d 288 (S.D.N.Y. 2005), the district court considered a non-decisionmaker's remark. Honey Seltzer alleged she was terminated because of age discrimination. Ms. Seltzer asserted that in spring 2001, her then-supervisor showed her a bracelet which was a gift for his wife and commented to plaintiff that "if you were 20 years younger and blond and beautiful, you'd get [a bracelet]." Ms. Seltzer ceased working for this supervisor in June 2001, and her employment was terminated in September 2002 when she was 72. The district court found that the remoteness of the remark, the fact that it was made by a former rather than a current supervisor, and the words themselves, supported the conclusion that the remark did not evidence that her termination was motivated by age discrimination.

Likewise, in *Posner v. Sprint/United Mgmt. Co.*, 478 FSupp2d 550 (S.D.N.Y. 2007), the district court considered the relevance of a non-decisionmaker's comment which was temporally remote from the adverse employment decision. After nearly 20 years of employment, David Posner alleged that his employment was terminated in May 2004 at age 60 because of age discrimination. Sprint asserted that his employment was terminated because in April 2004 an anonymous source alerted Sprint that Mr. Posner had opened toll-free lines for himself and his family under a customer's account. When confronted, Mr. Posner signed a statement admitting to this allegation.

In support of his age discrimination claim, Mr. Posner asserted that in 1997 another employee told him that a vice president made a remark about him at a meeting which Mr. Posner did not attend. The vice president reportedly said that Mr. Posner did not represent the future of Sprint. Mr. Posner presented no evidence that this vice president was involved in the decision to terminate his employment.

The district court found that the "remoteness of the remark, the fact that it was made by a non-supervisor, and the words themselves all support the conclusion that this remark does not evidence age discrimination." *Id.* at 559.

The district court also noted that even if this remark demonstrated any ageist disposition, "it is a classic stray remark uttered seven years before the termination." *Id.*

### Decisionmaker

In *Lawrence v. Thomson Learning, Inc.*, No. 05-329, 2007 U.S. Dist. LEXIS 39988 (N.D.N.Y. June 1, 2007), the district court considered a decisionmaker's comment which was unrelated to the decision process. Zina Lawrence alleged that she was passed over for a promotion, disciplined and then discharged in June 2003 because of her race. Three months before the discharge, Ms. Lawrence's supervisor allegedly remarked that she did not verbally confront Ms. Lawrence about her performance issues because Ms. Lawrence was a "scary person." Ms. Lawrence asserted that this remark evidenced racial discrimination.

The supervisor asserted that she was afraid to meet with all employees, including Ms. Lawrence, outside the presence of human resources personnel. The district court found that the alleged "scary person" remark did not have a sufficient nexus to Ms. Lawrence's termination, especially considering that both Ms. Lawrence and the supervisor agreed that their working relationship was relatively conciliative and without tension. Thus, no nexus existed between the remark and the adverse employment action.

### Totality of the Evidence

The Second Circuit has emphasized that although evidence of one stray remark by itself is usually not sufficient proof to show discrimination, a stray comment may "bear a more ominous significance" when considered within the totality of the evidence. *Carlton v. Mystic Transp., Inc.*, 202 F3d 129, 136 (2d Cir. 2000); see also *Schreiber*, 324 FSupp2d at 522-23.

In *Tomassi*, 478 F3d 111, plaintiff, Patricia Tomassi, alleged she was terminated at age 63 in violation of federal and state age discrimination laws. Defendant asserted that she was terminated because of her poor performance, her violation of a policy on communicating with the media, and the supervisor hired someone with Web site experience to take over her position. Her direct supervisor made frequent references to Ms. Tomassi's age such as beginning sentences with "in your day and age" and suggested that Ms. Tomassi related well to and "could understand the mentality of" the senior residents.

After a year and a half of employment, the company and Ms. Tomassi's supervisor sought to attract a new, younger clientele, and the

supervisor made a point of hiring "younger, energetic, attractive" employees. When she was fired, Ms. Tomassi asserted that the supervisor stated that Ms. Tomassi "probably didn't want to work long hours any more," "you get along with seniors," and praised Ms. Tomassi for her "great skills."

The district court attributed no significance to the supervisors' numerous comments about Ms. Tomassi's age. The district court merely classified the remarks as stray and ceased any further analysis regarding the totality of the circumstances. In contrast, the Second Circuit considered the remarks in the context of all the evidence and found that the comments were legally sufficient to sustain a reasonable inference that the supervisor could have been motivated by age discrimination when terminating Ms. Tomassi. Thus, a stray remark must be evaluated within the totality of the circumstances to determine whether it supports an inference of intentional discrimination.

In an evaluation of the totality of the circumstances, the frequency of the remarks is a factor. In *Quimby v. WestLB AG*, No. 04-7406, 2007 U.S. Dist. LEXIS 28657 (S.D.N.Y. April 19, 2007), plaintiff, Claudia Quimby, alleged that her employment was terminated and that she was denied bonuses because of gender discrimination and in retaliation for filing a complaint with the Equal Employment Opportunity Commission. Defendant alleged that her employment was terminated for poor performance. In support of her prima facie case, Ms. Quimby submitted evidence of numerous remarks made by her supervisor who was also the person responsible for her termination. Such alleged remarks included: "women are a problem, they are high maintenance in the context of work," there is a "girlie way" of doing work which differs from the "right way," using words such as "bitch" at the workplace, and characterizing a wine as "silky...much like, I imagine, a 16 year old French teenager."

The district court stated that although it is unclear whether these remarks were made temporally close to when Ms. Quimby's employment was terminated, "that consideration is less significant where, as here, there is evidence that the supervisor repeatedly used such language" and because each alleged remark employs language that is gender-specific. *Id.* at \*19. The district court found a nexus between the allegedly discriminatory remarks and defendant's decision to discharge Ms. Quimby.

In evaluating the totality of the circumstances, courts go beyond plain words to determine whether, in the context used, they evidence discriminatory animus, as

opposed to simply the speaker's recognition of an employee's circumstances, even if relevant to a protected status. For example, New York-based courts have repeatedly made clear that the Age Discrimination in Employment Act "does not make all discussion of age taboo." *Raskin v. Wyatt Co.*, 125 F3d 55, 63 (2d Cir. 1997). In circumstances where an employer gives a longstanding and older employee the opportunity to "retire," instead of being terminated, the same "tends to show a desire to provide [] an opportunity to avoid the stigma associated with having been fired," rather than evidencing discriminatory animus. *Young v. General Foods Corp.*, 840 F2d 825, 831 (11th Cir. 1988), cert. denied, 488 U.S. 1004 (1989).

Of particular relevance in the totality of the circumstances analysis is the timing of the termination decision. Where the termination decision was made prior to an alternative choice of retirement being discussed with the affected employee, said remarks are not evidence of discriminatory animus based on age. *Id.* In short, where the surrounding circumstances evidence that termination is a foregone conclusion in light of economic circumstances, remarks about the possibility of retirement as an option is not considered discriminatory. *Roundtree v. School Dist. of Niagara Falls*, 741 NYS2d 633 (4th Dept. 2002).

### Conclusion

A conclusion that a remark "looks and sounds discriminatory" or "looks and sounds neutral" is only the first step to determining whether it may be admissible, relevant evidence demonstrating discriminatory intent. Analysis regarding the totality of the circumstances is then necessary. Therefore, before implementing a termination decision, employers are cautioned to look at all circumstances surrounding that decision, including who is responsible for making the termination decision, who is providing input for that decision, the business reason for the decision, and any discriminatory comments or stray remarks that may have been made by any person involved in the termination process. These circumstances should be carefully scrutinized with counsel before a termination decision is implemented to ensure that the decision-making process is free from discriminatory animus.