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## EMPLOYMENT LAW

### Court Refuses to Order New Trial in Discrimination Case

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*Special to the Legal*

**B**ecause the overwhelming majority of employment discrimination cases either settle or are resolved on motions, trials and post-trial appellate decisions are infrequent, to the point of rarity. The recent decision in *Tokash v. Foxco Insurance Management Services*, No 13-1172 (3d Cir. Dec. 3, 2013), is, therefore, a welcome opportunity to consider the U.S. Court of Appeals for the Third Circuit's deference to jury verdicts.

#### VERDICT FOR DEFENSE AFTER FOUR-DAY TRIAL

Carol Tokash was an insurance underwriter for Foxco/Excalibur Insurance, a small company providing insurance-related services in Central Pennsylvania. Tokash had worked for Foxco for 14 years when, in spring 2008, she was told that she would be laid off in the future, the opinion said. Five months later, on Aug. 29, 2008, this came to pass. Tokash was 66 years old at the time. She brought suit against her former employer for age discrimination. After a four-day trial, the jury returned a verdict for Foxco. The trial court denied Tokash's



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motion for a new trial and she appealed this decision, the opinion said.

The appellate court noted that "prior to the trial, Tokash seemed to have a strong case." This was based primarily on a number of facts seemingly favorable to Tokash. First, she was replaced by someone in her mid-30s who seemed to be less qualified than Tokash to perform the duties in question. Secondly, Foxco had laid off Tokash's replacement previously and, upon her return to the company, had asked Tokash to train her. Finally, Foxco's employee handbook stated that the company required employees to retire at age 65, according to the opinion.

#### VERDICT NOT AGAINST THE WEIGHT OF THE EVIDENCE

Tokash's principal challenge to the jury's verdict was that it was against

the weight of the evidence. The court noted that on appeal, the losing party must "convince" the court that "(1) the jury reached an unreasonable result and (2) the district court abused its broad discretion in setting that verdict aside." While the standard is that the district court has "broad discretion" to set aside the verdict, the *Tokash* court found that where the "subject matter of the litigation is simple and within a layman's understanding, the district court is given less freedom to scrutinize the jury's verdict."

The issue at trial was whether Tokash had established pretext by showing that either Foxco's reason for terminating her was "not credible" or that age discrimination was "the motivating or determinative cause" of the termination, the opinion said.

#### SUPERVISOR DENIES STATEMENT

In addition to the undisputed evidence discussed above, Tokash testified at trial that one of her supervisors had told her that she and a co-worker had been "caught up in age-based terminations." Although the supervisor denied having made the statement, Tokash argued that "no reasonable jury could have believed [the supervisor] when she denied"

the statement. The court rejected this argument, citing numerous cases and treatises to the effect that “the appellate court must ensure that the evaluation of the credibility of witness testimony remains the sole domain of the jury.”

## **MANDATORY RETIREMENT IN HANDBOOK NOT IMPLEMENTED**

With respect to the mandatory retirement provision of the company’s handbook, Foxco’s owner testified that he was unaware of it and that the company had never enforced a mandatory retirement age. While Tokash argued that this testimony should have been rejected by the jury, the court found that, again, this was a witness credibility determination best left for the jury.

Tokash also argued that Foxco’s decision to have her train her replacement “exposed her termination as nothing but a swap of an older employee for a younger employee.” However, the court found that Tokash ignored evidence that her replacement was intended to perform a wider set of duties than Tokash had performed and that Tokash was considered to have difficulty in grasping new concepts.

## **‘BUSINESS JUDGMENT’ NOT QUESTIONED**

It turned out, however, that Tokash’s replacement ultimately did not perform the additional duties for which she had been rehired, the opinion said. In the light most favorable to the jury verdict, the court found that “businesses frequently err in their

decisions and miscalculate in their predictions.” While it was possible that Foxco “exercised poor business judgment in replacing Tokash ... it was surely not [the appellate court’s] function to review it.”

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This “business judgment” issue was revisited in Tokash’s challenge to the jury instructions. The court instructed the jury, in part, that, “You cannot find intentional discrimination simply because you disagree with the business judgment of [the company] or believe it was harsh or unreasonable. You are not to consider [Foxco’s] wisdom. However, you may consider whether [Foxco’s] reasoning is merely a cover-up for discrimination.” Counsel for Tokash had asked the trial court to instruct the jury by reading language directly from the Third Circuit’s bedrock decision in *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994). The court found Tokash’s desired language to be nothing more than taking “her favored line out of context [while] disregarding the rest of the sentence

and paragraph.” Moreover, the court found that in jury instructions, a court should “avoid quoting judicial opinions ... because [such] decisions contain a level of diction that is inappropriate in an instruction directed to nonlawyers.”

Finally, the court rejected Tokash’s argument that the trial court should have instructed the jury that mandatory retirement provisions are impermissible. Given that there was evidence that the mandatory retirement provision was not considered in Tokash’s termination, the illegality of the mandatory retirement provision would have had no bearing on the intentional discrimination claim.

In short, the jury’s verdict did not represent a “miscarriage of justice,” nor did the verdict “[cry] out to be overturned or [shock the court’s] conscience.” Like most trials, this one appeared to have evidence supporting both parties. As such, a verdict for either party was possible and the jury’s verdict would be respected. •