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EMPLOYMENT LAW

Court Sides With Employee in Anti-American Bias Discrimination Case

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Special to the Legal

National origin discrimination claims typically involve allegations of discrimination based on an employee's non-American country of origin. *Middlebrooks v. Teva Pharmaceuticals USA*, Civ. A. No. 17-412 (E.D. Pa. Aug. 31, 2018), involved the atypical claim of alleged national origin discrimination based on anti-American bias. The court denied the employer's motion for summary judgment seeking to dismiss the plaintiff's claim for national origin discrimination stemming from his termination, as well as his age discrimination and retaliation claims.

Stephen Middlebrooks is a 60-year-old American who began working for Teva Pharmaceuticals USA Inc. in 2001 in the company's North Wales, Pennsylvania, office. In or around 2013, Teva created a global facilities management group. Teva chose Nir Aharoni, a then-53-year-old Israeli, based in Israel, to lead the new group. In November 2014, Aharoni promoted Middlebrooks to senior director, facility management for the newly formed North American facilities management group. Prior to promoting Middlebrooks, Aharoni asked him about his age and retirement plans.

Teva annually evaluated Middlebrooks' performance on a five-level scale of "below," "mostly meets," "meets," "exceeds," and



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"exceptional." Prior to his 2014 promotion, the plaintiff had never received a rating below "meets." However, two months after his promotion, Middlebrooks received his 2014 annual performance review from Aharoni with an overall rating of "mostly meets." Middlebrooks also did not receive an equity award, which he had also always received prior to 2014.

COMPLAINTS OF CULTURAL AND AGE BIAS

Roughly six months after Middlebrooks was promoted, Teva began searching for his replacement. In June 2015, two of Teva's Israeli-based managers visited the North Wales facility to meet with the plaintiff and his team. Middlebrooks and his team became

concerned about perceived cultural and age bias following the meeting. They met with a human resources employee, to discuss their concerns. One employee complained of a hostile work environment and another complained of inquiries about her age. The human resources employee determined the complaints warranted an investigation and informed Aharoni of same. Middlebrooks claimed the investigation angered Aharoni, which Aharoni disputed.

INVESTIGATION

Teva's director of human resources conducted the investigation. The investigation found that the two Israeli-based managers asked Middlebrooks and some of his team members to provide the ages of employees and directly asked some employees for their age. Middlebrooks told the investigator he asked "management" to stop the requests for age-related information, but received written requests for the information until he advise he would "make sure someone got fired" if he received another request. The investigation also revealed concerns of perceived bias against Middlebrooks and his team of American employees by Israeli-based management, including the perception of favoritism of Israeli employees over American employees.

While the investigation concluded that no hostile work environment existed, it identified several concerns, including Israeli managers' requests for age and demographic information of

employees and perceived ethnic bias. Finally, the investigation recommended that Aharoni and the two Israeli-based managers who visited the North Wales facility receive “cultural and sensitivity training ... especially on U.S. practices/law, culture, and ways of working.” Aharoni received a condensed version of the investigation report on Oct. 14, 2015.

PERFORMANCE IMPROVEMENT PLAN

One week after Aharoni received the investigation report, he gave Middlebrooks a negative midyear review. Following the midyear review, Aharoni placed Middlebrooks on a performance improvement plan (PIP)—although as per policy, employees who receive a “mostly meets” rating are to receive a performance consistency plan (PCP), which is viewed as less significant. Middlebrooks sent Aharoni and human resources employees an email expressing his belief that he was placed on the PIP due to age and national origin discrimination and as retaliation for his complaints about the requests for age information and ethnic bias. He also dual filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) and Pennsylvania Human Relations Commission (PHRC).

TERMINATION AND LAWSUIT

Teva extended Middlebrooks’s PIP to the end of February 2016 then terminated him on Feb. 29, 2016. Teva replaced Middlebrooks with a 38-year-old.

The plaintiff filed a timely lawsuit against Teva, alleging claims of national origin discrimination (Title VII and PHRA), age discrimination (ADEA and PHRA), and retaliation (ADEA, Title VII, and PHRA). After the close of discovery, Teva moved for summary judgment.

EVIDENCE OF PRETEXT ON AGE AND NATIONAL ORIGIN DISCRIMINATION CLAIMS

The court determined Middlebrooks easily established a prima facie case of age and

national origin discrimination. Teva’s proffered legitimate nondiscriminatory reason for terminating Middlebrooks was his poor performance and failure to meet the conditions of his PIP. The court’s analysis primarily focused on the existence of evidence that Teva’s proffered reason was pretext.

On the age discrimination claim, the court found a genuine issue of material fact on the issue of pretext due to multiple factors including: Teva’s divergence from its own policies by placing Middlebrooks on a PIP; testimony

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by Aharoni that he inquired about employees’ retirement plans; inconsistencies with Aharoni’s explanation on why Middlebrooks did not receive an equity award; testimony from Middlebrooks’ team regarding age-related questions from Israeli-based managers; and Middlebrooks’ replacement with a younger employee.

The court also found there to be a genuine issue of fact as to pretext on the national origin discrimination claim based upon: testimony by Middlebrooks and his former team members of various incidents of perceived anti-American bias by Teva’s Israeli-based management; evidence comments about Americans by Israeli employees; and the lack of discipline for the two Israeli-based managers for their conduct during the June 2015 meeting. The court also noted evidence that

Aharoni had performance issues for which he was neither disciplined nor placed on a PIP.

The court rejected Teva’s argument that Aharoni both promoting and terminating Middlebrooks precluded Middlebrooks from establishing pretext, finding the “same actor inference” was not dispositive on the issue.

UNUSUALLY SUGGESTIVE TEMPORAL PROXIMITY

The court determined Middlebrooks engaged in protected activity when he sent the email complaining about his placement on a PIP and there was at least a factual issue as to whether he complained of discriminatory treatment following the June 2015 meeting with the Israeli-based managers. On causation, the court found evidence of unusually suggestive temporal proximity between Aharoni’s receipt of the investigation report and the negative mid-year review he gave Middlebrooks one week later and Middlebrooks’ placement on a PIP only one week after that. The court also found supplementary evidence of causation, including the absence of any documentation of poor performance by Middlebrooks between January and the October 2015 midyear review and his placement on a PIP contrary to Teva’s policy.

Middlebrooks serves as caution that international employers with American operations must abide by American employment law. Employers can be held liable under Title VII and the PHRA for anti-American bias. Training international managers on workplace harassment and discrimination issues similarly to American managers may help to curb such claims. *Middlebrooks* also offers yet another example of an employer losing a motion for summary judgment due to its failure to follow its own policies. Time and again, this has been shown to be strong evidence for plaintiffs on the issue of pretext. •