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## EMPLOYMENT LAW

# Inconsistent Performance Standards Dooms Defense Case

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*Special to the Legal*

Over the years, a consistent theme of this column has been that employers need to hold all employees, regardless of protected characteristic, to the same standard in order to avoid even the appearance of discrimination. These are generally “employment words to live by.” Realistically, however, managers often hold more senior employees to a higher standard than they do relative newcomers. While a number of courts recognize this reality, in the recent case of *Larison v. FedEx Corporate Services*, No. 16-5921 (E.D. Pa. June 9, 2017), the manager’s shifting explanation of her performance standards created a “genuine issue of fact,” which defeated summary judgment.

### 8 YEARS OF EXPERIENCE AS ACCOUNT EXEC

The fact-pattern is one that is often seen. Justine Larison began working for FedEx as a sales account executive in March 2007 and remained in this position until her termination in July 2015 at the age of 45. Larison’s employment was considered to be



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generally acceptable for the first five years of her employment until an appreciably younger woman, Stephanie Nardiello, became her manager in 2012, according to the opinion.

### NEW MANAGER

Within a year of becoming her manager, Nardiello began to criticize Larison, stating that “she needed to focus on closing new business accounts.” A few months later, in early 2014, Nardiello told Larison that her sales activity was “unacceptable and needs to improve” within the next 60 days, the opinion said. Nevertheless, in June 2014, Nardiello rated Larison’s

over-all performance as “generally acceptable” and specifically rated her sales performance as “meets some expectations.” As such, when Nardiello requested the authorization to terminate Larison in August, 2014, FedEx’s human resources adviser denied the request. Instead, Nardiello issued Larison a “warning letter regarding her deficiency in closing new business,” along with a plan to regularly meet with Larison.

Two weeks later, however, Nardiello requested that her weekly coaching meetings with Larison be canceled because Larison was complaining about them. Her request to human resources added, “I plan on pursuing this at the end of her second warning letter on Sept. 29.” The human resources adviser believed that the “this” was Larison’s termination. Larison was not terminated at the end of September 2014. In December, Nardiello issued yet another warning letter to Larison. This, despite the fact that Larison’s sales performance had improved.

### TERMINATION AUTHORIZED

In July 2015, Nardiello again requested the authority to terminate Larison based upon her not having

“brought on enough new significant business.” This time, HR authorized the termination.

Larison brought suit against FedEx, claiming that she was discriminated against on the basis of her age. At the conclusion of discovery, FedEx moved for summary judgment. Larison opposed the motion, providing three principal arguments of pretext.

## **HIRING STATISTICS DO NOT DEMONSTRATE PRETEXT**

Initially, Larison argued that Nardiello’s hiring practices evidenced discriminatory animus. Specifically, when Nardiello became sales manager in 2012, the average age of the nine sales professionals reporting to her was 47. Seven of the original nine sales persons had changed by the time of Larison’s termination and the average age of “new” sales staff was just 34.5 years old. Despite the intuitive appeal of this argument, the court rejected it as evidence of pretext, finding that while “statistical evidence of an employer’s pattern and practice with respect to minority employees may be relevant to a showing of pretext ... raw numbers merely showing underrepresentation of a particular minority group is not probative of discriminatory motive.” The court found that Larison’s purported hiring trend was “not accompanied by any analysis of either the qualified applicant pool or the flow of candidates over a relevant time period.”

## **ANONYMOUS COMPLAINTS INSUFFICIENT**

Secondly, Larison pointed to the fact that after her termination, FedEx received numerous anonymous employee complaints of age discrimination as evidence of discriminatory bias. The court found that it could not

consider the anonymous complaints because it lacked “objective evidence demonstrating age bias.” The court found that the complaints were, at most, “mere subjective beliefs.”

## **INCONSISTENT APPLICATION OF SALES STANDARDS**

However, the court found evidence of pretext in the fact that Nardiello continued to employ younger sales representatives with sales per-

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formance significantly below that of Larison. Specifically, Larison pointed to two account managers whose sales performance was significantly worse than hers. The lagging managers, however, were also far less experienced than Larison. One of the younger “comparators” had just started his career with FedEx and the other had just two years of experience.

Nardiello testified, on one hand, that she “expected Larison to close more business than [younger and less experienced members of the sales team] because she had more experience than them.” On the other hand, she testified that she held all of her direct reports to the same standard “for closing business.”

## **EXPERIENCE COUNTS**

The court cited decisions from the U.S. Court of Appeals for the

Sixth and Tenth circuits holding that an employer could “rightfully evaluate a senior-level employee under standards higher than those applied to lower-level, younger employees.” But Nardiello’s inconsistent testimony that “the entire sales team” was “held to the same standard” effectively undermined her argument—or at least created an inconsistency. While it would have been reasonable and, in fact, expected, that the younger account managers’ sales production would have lagged behind someone like Larison with eight years’ experience, Nardiello’s failure to explain this, or at least consistently hold to this position, effectively defeated summary judgment.

The lesson of the case is clear. While consistency is important, a credible explanation is better. It was apparent that Larison performed better than at least some of her co-workers. At that point, “consistent application of standards” was unlikely to prevail on summary judgment. Rather, FedEx needed to explain the inconsistency as a legitimate reason. The case can also be read as an acknowledgement that, under certain circumstances, holding a more experienced employee to higher performance standards may be acceptable—but that explanation must be consistently maintained. •