ATTACHMENT 2

2017-2018 APPELLATE CASE MATERIALS

IN THE SUPREME COURT OF THE STATE OF TEXAS

No. YAG-APP-2017

CONTINENTAL CATERING CONSOLIDATED COMPANY, Petitioner

vs.

JAMES O'CALLAHAN, Respondent

On Appeal from

The 15th Court of Appeals

SUPREME COURT IN THE STATE OF TEXAS

CONTINENTAL CATERING CONSOLIDATED COMPANY, Petitioner

vs.

JAMES O'CALLAHAN, Respondent

Docket No. YAG-APP-2017
September 15, 2017

CASE BELOW:

17-01123: Continental Catering Consolidated Company v. James O'Callahan; from Travis County, 15th Dist. (CV-31164): The Petition for Review filed by Continental Catering Consolidated Company is GRANTED.

Appeal is **GRANTED** of the Petition for Review filed by Continental Catering Consolidated Company so that the court may hear and consider the issues raised by the record.

The issues before the Court are:

(1) **Whether the summary judgment evidence raised a genuine issue of material fact concerning any direct evidence of age-related discrimination alleged by James O'Callahan; and**

(2) Whether the trial court was presented with legally sufficient circumstantial evidence to support O'Callahan's contention that the stated reasons for his termination were a pretext for age-related discrimination.

It is further ordered that this case be set down for an expedited hearing in the January 2018 term of this court. The Petitioner, Continental Catering Consolidated Company, shall present argument first.

Noelle Mitchell
Noelle Mitchell, Chief Justice

IN THE COURT OF APPEALS

FOR THE 15TH DISTRICT OF THE STATE TEXAS

SEPTEMBER 15, 2017

JAMES O'CALLAHAN, Appellant

vs.

No. CV-31164

Continental Catering Consolidated Company, Appellee

On appeal from the 222nd District Court of Travis County, Texas

Before Justices Sophia, Henry and Clyde
Clyde dissented and filed an opinion

OPINION

Justice SOPHIA for the majority:

Appellant James O'Callahan filed this lawsuit against his former employer, Appellee Continental Catering Consolidated Company (hereinafter "4C's"), seeking damages under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. I 623 et seq. In his Original Petition, O'Callahan claimed that 4C's terminated his employment based upon his age. Prior to trial, the trial court granted 4C's Motion for Summary Judgment and dismissed O'Callahan's claims. For the reasons stated below, we reverse the judgment of the trial court and remand this case for a trial on the merits.

I.
FACTUAL BACKGROUND

O'Callahan was originally hired as a salesman with 4C's, which is a vending and food services company. During the course of his employment, O'Callahan was promoted to the position of General Manager of 4C's North Region, and then re-assigned to become General Manager of the South Region. Beginning in or about July 2012, 4C's and its parent corporation, Cayman Corporation, began major restructuring of their respective operations in North Carolina and South Carolina. The restructuring eventually resulted in consolidations of business operations conducted by the two companies in those regions. The area previously managed by O'Callahan, 4C's South Region, was combined with Cayman Corporation's South Carolina operations, and assumed by Mr. Ted Finnell, age 40. O'Callahan was terminated at that point, and was 56 years old at the time of his termination.

In his pleadings, O'Callahan sued 4C's under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. I 623, et seq., claiming that his age served as a motivating factor in 4C's decision to terminate his employment. Prior to trial, 4C's filed its Motion for Summary Judgment under Tex. R. Civ. P. 166a and 166a(i). In its motion, 4C's claimed that the evidence, even when viewed in a light most favorable to O'Callahan, did not support a claim of age discrimination as a matter of law. According to 4C's, O'Callahan was not terminated due to his age, but instead his position was eliminated due to corporate restructuring. In support of its motion, 4C's attached the pre-trial affidavits obtained from O'Callahan, Allison Young, Phillip Dennis, Ted Arts, Edward Williams, and Mike Kiser. In his response, O'Callahan also relied upon those affidavits, as well as performance evaluation memoranda, to contend that, at a very minimum, the evidence raised a genuine issue of material fact on the issue of discrimination. In particular, O'Callahan relied upon several oral statements attributed to Mr. Ed Williams, who was the vice-president of 4C's and also one of the vice-presidents of Cayman Corporation. According to O'Callahan, Mr. Williams' statements were derogatory towards O'Callahan's age, and thus provided direct evidence of his discriminatory intent. O'Callahan also argued that, at a very minimum, the statements served as circumstantial evidence demonstrating that the reasons stated by 4C's for

its termination of O'Callahan were merely a pretext for its discrimination against him due to his age. O'Callahan also claimed that other facts raised circumstantial evidence of discrimination on behalf of 4C's. Nevertheless, the trial court granted summary judgment in favor of 4C's and dismissed O'Callahan's claims prior to trial.

II.
ARGUMENTS ON APPEAL

O'Callahan has brought two points of error in this Court. First, O'Callahan claims that the trial court erred in summary judgment since the statements of Mr. Williams provided direct evidence of discriminatory intent. According to O'Callahan, this evidence alone raises a genuine of fact regarding discrimination, thus precluding disposition of his claims by summary judgment. Second, O'Callahan contends that Williams' statements and other facts serve as circumstantial evidence to prove that 4C's explanation for the reasons of his termination were merely a pretext for discrimination. For these reasons, according to O'Callahan, the trial court committed reversible error by dismissing his claims prior to trial. We will analyze each of these arguments below.

(a) *Burden on Summary Judgment*:

The purpose of summary judgment is to permit a trial court to promptly dispose of cases that involve unmeritorious claims or untenable defenses. City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 n.5 (Tex. 1979). However, summary judgment is not intended to deprive litigants of their right to a trial, or to permit a trial by affidavits or deposition testimony. Id. As movant on summary judgment, 4C's was required to demonstrate that no genuine issue of material fact existed with respect to any element of O'Callahan's claims, and as such, that 4C's

was entitled to judgment as a matter of law. Park Place Hosp. v. Estate of Milo, 909 S.W.2d 508, 509 (Tex. 1995). All evidence favorable to O'Callahan, as the non-movant, must be taken as true, and all reasonable inferences are to be indulged in his favor. Nixon v. Mr. Property Mgmt. Co., 690 S.W.2d 548, 549 (Tex. 1985). The trial court's only duty at the summary judgment stage is to determine whether a material question of fact exists. Huckabee v. Time Warner Entertainment Co., 19 S.W.3d 413, 421-22 (Tex. 2000). In the event that the evidence, in a light most favorable to the non-movant, raises such a fact issue, then the trial court must deny the motion and permit the case to proceed to a trial on the merits.

(b) *Age Discrimination Claims:*

Under the ADEA, it is unlawful for an employer "to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. I 623(a)(1). One of the primary issues in any ADEA case concerns the manner in which the terminated employee attempts to prove the existence of discrimination. Very rarely does an employee have the benefit of being able to offer direct evidence of discrimination, such as when an employer actually admits to terminating the employee on the basis of his or her age. Because direct evidence of discrimination is rare, the United States Supreme Court has established a "burden-shifting" analysis to be applied in discrimination cases. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993); McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). The burden-shifting analysis under McDonnell-Douglas was designed to ensure that employees have their day in court, despite the absence of direct evidence of discrimination.

See TransWorld Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985). The burden-shifting analysis can be summarized as follows:

(1) First, the employee is required to establish a "prima facie" case of discrimination. Reeves v. Sanderson Plumbing Prod., Inc., 120 S.Ct. 2097, 2106 (1973). In order to establish a "prima facie" case under the ADEA, the employee must initially show that he or she (1) is 40 years of age or above, (2) was qualified for the position, (3) was subjected to an adverse employment decision of the employer, and (4) either replaced by someone outside the protected class or someone younger, or otherwise discharged or discriminated against because of age. Price v. Marathon Cheese Corp., 119 F.3d 330, 336-37 (5 Ih Cir. 1997); Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 992 (5th Cir. 1996).

(2) Once the employee has established a "prima facie" case, the burden then shifts upon the employer to articulate a legitimate, non-discriminatory reason for the employee's termination. Reeves, 102 S.Ct. at 2106. At this stage, the employer is merely required to present evidence that, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action. St. Mary's Honor Center, 509 U.S. at 507.

(3) If the employer states a legitimate, non-discriminatory reason for the termination, then employee is then required to demonstrate by circumstantial evidence that the reasons offered by the employer were merely a pretext for discrimination. Reeves, 120 S.Ct. at 2106.

This "burden-shifting" analysis, however, does not need to be applied when direct evidence of discrimination exists. See TransWorld Airlines, Inc., 469 U.S. at 121. Comments made by an employer's representatives can, under certain circumstances, provide such direct evidence of discrimination. See Brown v. CSC Logic, Inc., 82 F.3d 651, 655-57 (5th Cir. 1996); Heim v. State of Utah, 8 F. 3d 1541 (16th Cir. 1993). In order to qualify as direct evidence of discrimination, the comments must be (1) related to the protected class at issue; (2) proximate in time to the employment decisions or discrimination at issue; (3) made by a person with authority over the employment decisions in question, and (4) related to the employment decisions at issue. Brown, 82 F.3d at 655. In the event that the comments meet these criteria, the employee can establish a prima facie case of discrimination even without establishing more-favorable treatment given to a member of a different class. Id.

(c) *Summary judgment arguments and evidence*:

In his response to 4C's Motion for Summary Judgment, O'Callahan contended that both direct evidence and circumstantial evidence of discrimination existed. First, O'Callahan claimed that several statements made by his supervisor, Mr. Ed Williams, provided direct evidence of his discriminatory intent, including the following:

(1) While watching a televised golf tournament in a company conference room, O'Callahan mentioned that he could not play 18 holes of golf during five consecutive days. Williams allegedly replied, "That's obvious, you're too damn old." Williams also stated that if O'Callahan went to the gym, he would be in better shape.

(2) At one point, Williams came into O'Callahan's office and stated "O'Callahan, you are too damn old for this kind of work and I think you should consider retiring."

(3) While travelling on company business, a co-employee made a statement about his approaching 57th birthday, to which Williams allegedly replied, "Isn't getting old a pain? … I sure am glad I am not as old as you guys."

(4) A human resource manager for 4C's asked Williams why O'Callahan was being fired, to which Williams reportedly replied, "the company needed some young blood around here to create a new image."

O'Callahan also argued that the above-referenced statements of Williams, at a very minimum, served as circumstantial evidence under the burden-shifting analysis to demonstrate that the alleged reasons for his termination offered by 4C's were merely a pretext for discrimination. O'Callahan also relied upon several other matters raised by the various witness affidavits and evidence to establish pretext, including but not limited to his mere favorable performance evaluations; an inquiry made by Williams into employees' birthdays; and 4C's purported treatment of other employees over the age of 40.

Based upon the foregoing, the evidence raises genuine issues of fact regarding 4C's age-based discrimination of O'Callahan. Specifically, the comments allegedly made by Williams satisfy the elements set forth in Brown and thus qualify as direct evidence of age discrimination. In particular, Williams purportedly referred to the company needing "young blood" when asked by a co-employee about the reasons for O'Callahan's termination.

The other comments attributed to Williams are also relevant under the third stage of the MacDonnell-Douglas analysis, under which O'Callahan was required to prove that 4C's articulated reasons for its termination were merely a pretext for discrimination. See Ramirez v. Allright Parking El Paso Inc., 970 F.2d 1372, 1378 (5th Cir. 1992) (comments suggesting a bias or animus against the protected class may be used to demonstrate pretext); see also Chacko v. Texas A&M Univ., 960 F. Supp. 1180, 1191-92 (S.D. Tex. 1997), affd, 149 F.3d 1175 (5th Cir. 1998). Because Williams' purported comments alone raise a genuine issue of material fact on the issue of discrimination, the trial court erred in granting summary judgment and dismissing this case prior to trial. In light of our holding in this regard, we need not address O'Callahan's remaining arguments concerning the other purported circumstantial evidence of discrimination raised by the witness statements and the evidence.

IV.
CONCLUSION

The majority of this Court thus reverses the summary judgment of the trial court below, and remands this case to the trial court for a trial on the merits.

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Justice Sophia

DISSENT By Justice Clyde

I dissent. The trial court properly granted summary judgment on O'Callahan's claims alleged under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. I 623 et seq., since the evidence wholly failed to raise a genuine issue of material fact on the central issue of age discrimination. "Simply because a piece or pieces of evidence are material in the sense that they make a 'fact this is of consequence to the determination of the action more ...or less probable' does not render the evidence legally sufficient." Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 24-25 (Tex. 1994). When viewed in a light most favorable to O'Callahan, the evidence is simply insufficient as a matter of law to prove that age was a motivating factor in 4C's decision to restructure its business operations, which resulted in O'Callahan's separation of employment.

First, O'Callahan claims that statements purportedly made by his former supervisor, Mr. Ed Williams, provided direct evidence of age-based discrimination. Even viewed in a light favorable to O'Callahan, the alleged statements constitute nothing more than "stray comments" that cannot be used as direct evidence to establish discrimination, or circumstantial evidence to demonstrate pretext in discrimination cases. See Jaso v. Travis Co. Juvenile Board, 6 S.W.3d 324 (Tex. App.--Austin 1999, no writ). (supervisor told employee that she would consider retirement if she also had worked for 30 years; held to be mere stray remark, and not competent evidence to demonstrate pretext);

Price v. Marathon Cheese Corp., 119 F.3d 330, 337 (5th Cir. 1997) (supervisor's statement that he wanted to "get rid of the older employees" and hire "young blood" were stray remarks, and not evidence of discriminatory intent); Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 957 (5th Cir. 1993) (upon terminating employee, supervisor remarked, "I hope when I get your age, someone with do the same thing for me"; held to be stray mark and not competent evidence of pretext). Rather than demonstrating any intent to discriminate on the basis of age, Williams' comments appear to be nothing more than general statements about the effects of age upon one's skills and physical capabilities. In fact, one co-worker recounted an instance in which O'Callahan told him, "I wish I was as young as you and had your energy. . I'm just getting too old for this job." It is illogical for O'Callahan to characterize Williams' comments as evidence of a discriminatory intent, when O'Callahan himself had made similar comments regarding the effects of age in the workplace.

Furthermore, Williams' remarks do not qualify as direct evidence of discrimination under the test articulated in Brown v. CSC Logic, Inc., 82 F.3d 651, 655-57 (5th Cir. 1996). First, the affidavit of Mr. Ted Arts, president of 4C's and Cayman Corporation, established that he, and not Williams, was the person who decided to initiate the consolidation process that ultimately led to the elimination of O'Callahan's position. Because Mr. Arts was the person with the authority over the employment decision at issue, Williams' comments do not satisfy the third prong of the test under Brown. Second, O'Callahan failed to demonstrate that any of these remarks were proximate in time to the adverse employment decision at issue.

According to Ms. Allison Young, Mr. Williams informed her about the decision to consolidate the North Carolina and South Carolina operations of Caymen Corporation and 4C's "sometime in July 2012." By failing to establish the date of this decision with any greater precision, O'Callahan was unable to demonstrate that any of Williams' comments were made in proximity to that decision. Any comments allegedly made by Williams at or near the time of O'Callahan's separation of employment from 4C's are immaterial, since the decision to consolidate the business operations of the two companies was the actual event that ultimately led to the elimination of his position.

None of the remaining evidence relied upon by O'Callahan supports his allegation that 4C's stated reason for his termination was merely a pretext for discrimination. First, O'Callahan claims to have received a more favorable performance evaluation than a younger co-employee who was assigned a portion of O'Callahan's territories after the consolidation. This evidence, standing alone, hardly suggests that O'Callahan was the victim of age discrimination, especially in light of the fact that Mr. Williams—the alleged discriminator—was actually the supervisor who gave a more favorable evaluation to O'Callahan. Second, O'Callahan suggests that other employees, Ms. Allison Young and Mr. Alan Hunter, may have also received adverse employment decisions from 4C's due to their age. However, nothing in the summary judgment evidence supports the inference that these other employees were subjected to discrimination. Finally, O'Callahan offered evidence that Mr. Williams once sought out information regarding the employees' birthdays; according to O'Callahan, this fact provides circumstantial evidence of Williams' intent to discriminate against employees on the basis of their age. Once again, no reasonable inference of discrimination can be made from this evidence.

IV.
CONCLUSION

In summary, employment discrimination laws are "not intended to be a vehicle for judicial second-guessing of employment decisions nor ... to transform the courts into personnel managers." EEOC v. Louisiana Office of Community Services, 47 F.3d 1438, 1448 (5th Cir. 1995). The ADEA was never intended to permit employees to use their age to excuse shortcomings in their performance, or to hold employers liable when their employees simply discuss the effects of age. O'Callahan failed to bring forward any evidence to suggest that two corporate entities decided to consolidate their business operations simply to discriminate against him due to his age. Since the trial court did not commit reversible error by granting summary judgment, I strongly dissent from the majority opinion of this Court.

Justice Clyde

CASE NO. 2015-31164

JAMES O'CALLAHAN	§	**IN THE DISTRICT COURT**
PLAINTIFF	§	
VS.	§	**OF TRAVIS COUNTY,**
TEXAS		
	§	
CONTINENTAL CATERING	§	
CONSOLIDATED COMPANY	§	**222ND JUDICIAL DISTRICT**
DEFENDANT		

AFFIDAVIT OF ALLISON YOUNG

1. My name is Allison Young. I am over the age of twenty-one and have never been convicted of a crime or offense involving moral turpitude. I am fully authorized and competent to execute this Affidavit. I have personal knowledge of all facts stated herein, and such facts are true and correct.

2. I worked for Continental Catering Consolidated Company (4C's), from 1982 to December 23, 2012, when I was fired. I was fired just three (3) days after my 50th Birthday. I have not been able to find a job since I was fired because no one wants to hire someone 50 years old. I worked for 4C's for thirty years and this is how they treat you. I was never told the reason for my being terminated, I guess that is so the company can never be pinned down to a specific reason and can make up a reason that is beneficial to them.

3. I was employed as the Human Resource Manager. I was responsible for handling all employee related matters for the company and served as a liaison between upper management and the other employees. I am also responsible for maintaining all employee performance appraisals as well as their personal information.

Part of my job responsibilities included providing input into all hiring's, firings, promotions and demotions.

4. At the time Jim O'Callahan was fired, Ted Finnell was 33 years old and Mike Kiser was 35 years old.

5. In June 2012 Mr. Williams asked me to print out a list of all 4C's employees with their date of births. I asked Mr. Williams the reason for this list and he said very abruptly that it was none of my business. I guess he saw the shock on my face and then said that Ted Arts wanted the names and birthdays of all employees because he was going to implement a new policy of giving special birthday bonuses. I thought this was strange since I oversaw all personnel matters and this was the first time I had heard about this policy. Furthermore as of my last day with the company no such birthday bonus policy had been implemented.

6. Sometime in July 2012, Mr. Williams informed me of the consolidation of all Cayman and 4C's operations in North and South Carolina into a single region run by Mr. Williams. He also told me that he was combining the management responsibilities previously handled by Cayman's South Carolina Regional Vice President Ted Finnell, by Mike Kiser in 4C's North, by Jim O'Callahan in 4C's South, and by Alan Hunter in Cayman's Raleigh-Greensboro operation.

7. As the person in charge of all personnel matters, I also have knowledge of every employee's performance ratings. O'Callahan's 2011 rating was "commendable minus," a very good rating. "Commendable" means "a seasoned employee who is looked upon as a production or conceptual leader within an area. Mr. Williams made both of these ratings. It should be noted that O'Callahan's 2011 performance rating had been higher than both Kiser and Finnell's. In fact, for the several years preceding Jim's termination, he placed consistently higher within his salary class than did Finnell. Finnell's prior "competent minus" rating meant that he was performing on the low side of competent.

8. Furthermore, Mr. Williams had not supervised Finnell since the end of 2011.

9. At no time did Mr. Williams ask me for copies of Jim's performance ratings at any time prior to his termination.

10. I remember an incident in the latter part of July 2012. Mr. Williams went into Jim O'Callahan's office and said something to the effect to him,"O'Callahan, you are too damn old for this kind of work and that you should retire." I also heard him say something about retiring, but I am not sure. I know that Jim has never spoken to me about retiring. I remember telling Jim that Mr. Williams shouldn't say things like that. Because of my extensive training in employment related issues. I know that comments like that are discriminatory.

11. On August 8, 2012, Mr. Williams came to me and told me to prepare the necessary paperwork for Jim O'Callahan's termination which was to be effective on August 9, 2012. I asked Mr. Williams why Jim was being fired and why wasn't I consulted. Mr. Williams's response was that the company needed some young blood around here to create a new image. When I asked who was replacing Jim, Mr. Williams said Ted Finnell and Mike Kiser.

12. In my opinion, Finell and Kiser did not simply "replace" Petitioner. Jim's last job assignment consisted of managing three (3) North Carolina territories. After the consolidation, Finnell kept all of the company's South Carolina territories in North Carolina, only three of which had been managed by Jim just prior to the consolidation. The other three (3) went to Kiser.

13. I was aware that Jim did not have some problems in his region with some of his accounts. I was also told there had been a problem with a delivery truck. However, it was never brought to my attention that it was a serious matter.

14. It is my opinion that Jim O'Callahan was run out of this company because of his age; he did not fit the new corporate image of the company. I guess I didn't fit that image either.

15. I was arrested last year for excessive parking tickets. I have been told that the fine is $500.00 and up to two years in jail. I have not gone to trial in this matter.

_____

Allison Young

CASE NO. 2015-31164

JAMES O'CALLAHAN	§	IN THE DISTRICT COURT
PLAINTIFF	§	
VS.	§	OF TRAVIS COUNTY, TEXAS
	§	
CONTINENTAL CATERING	§	
CONSOLIDATED COMPANY	§	222ND JUDICIAL DISTRICT
DEFENDANT		

AFFIDAVIT OF PHILLIP DENNIS

1. My name is Philip Dennis, I am over the age of twenty-one and have never been convicted of a crime or offense involving moral turpitude. I am fully authorized and competent to execute this Affidavit on behalf on continental Catering Consolidated Company (4C's). I am a salesman with 4C's. I have personal knowledge of all facts stated herein, and such facts are true and correct.
2. I am 49 years old and have been with 4C's as a salesman for five (5) years. I have been in sales for almost twenty-seven years.
3. Jim O'Callahan and I are brother-in-laws, our wives are sisters. Jim got me a job with 4C's after my previous employer went bankrupt.
4. Jim was a great asset to 4C's. Because of his experience and knowledge of the company and the territories. I was able to learn from him and make the transition into this new company with great ease. Jim was always willing to share his experience and knowledge with those who asked him for advice; and a lot of people asked him for advice. This was in total contrast to Mr. Williams and Mr. Arts who did not seem to care about the people

who made up 4C's. Mr. Williams and Mr. Arts' sole concern is profits and cutting costs. On more than one occasion, Mr. Williams has said to me in passing that we, meaning 4C's, has to cut costs in order to stay profitable and that will probably mean cutting some of those highly paid employees.

The only highly paid people around 4C's beside the officers of the company are the General Managers and I knew that Mr. Williams had no intention of cutting his salary.

5. On August 7, 2012, two days before Jim was terminated, Mr. Williams, Jim, Alan Hunter, and myself were in a car on the way to lunch when Alan made some reference to his upcoming 57th birthday party that his wife was planning for him. Alan said that he told his wife not to put all the candles on the cake because it would probably set off the fire alarm and that he did not think he could blow out all the candles. Mr. Williams then made some comment about "isn't getting old a pain…I am sure glad I am not as old as you guys".

6. It is common knowledge around 4C's that Mr. Williams does not like the older workers. If you aren't young and in shape, he has no use for you. On several occasions I have heard Mr. Williams say to members of upper management that "the divisions future lay in its young." I have also heard him say to some of the elder employees, even Allison Young, that "all employees sometime reach the peak in efficiency."

7. There is also talk around the company that if you are not a member of the "Gold Club" you won't advance in this company. The Gold Club refers to that fact that there is a group of employees that workout at Gold's Gym with Mr. Williams and Mr. Arts.

8. On the day after Jim was fired, Mr. Williams called me into his office. I asked him why Jim was fired. Mr. Williams replied "that all of us were getting old, that Jim was getting old, and that there were three other persons around the office who were turning 50." I could not believe what I was hearing. I began to wonder if I was one of those people on his hit list.

9. Four days later Mr. Williams called me into his office. I thought for certain I was going to be fired too. Mr. Williams complained that Ted Finnell had reported that I was telling people that Jim had been fired because he was too old. I told Mr. Williams that based on our previous conversation that it appeared to me that is what he said. Mr. Williams said that I misunderstood him and that the reason Jim was allowed to resign was because of the recent changes in the structure of the divisions. Mr. Williams then said that if I continued to spread these rumors that he would fire me on the spot and that I could join the unemployment line like Jim.

10. Shortly, thereafter, I received my job performance rating. While all my previous ratings had been "commendable plus", my new rating was "competent minus," a significantly lower rating.

11. I went to Allison Young, the Human Relations Manager, to discuss my performance evaluation. She informed me that she had been specifically instructed by Mr. Williams to give me that evaluation. Ms. Young also stated that he asked her when I was born. I am sure Mr. Williams is just waiting until this lawsuit is over so he can fire me too; he is

just too afraid to do anything right now because he knows I will sue this company for everything they have.

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Philip Dennis

CASE NO. 2015-31164

JAMES O'CALLAHAN	§	IN THE DISTRICT COURT
PLAINTIFF	§	
VS.	§	OF TRAVIS COUNTY, TEXAS
	§	
CONTINENTAL CATERING	§	
CONSOLIDATED COMPANY	§	222ND JUDICIAL DISTRICT
DEFENDANT		

AFFIDAVIT OF JAMES O'CALLAHAN

1. My name is James O'Callahan. I am over the age of twenty-one and have never been convicted of a crime or offense involving moral turpitude. I am fully authorized and competent to execute this Affidavit. I have personal knowledge of all facts are true and correct.
2. I worked for continental Catering Consolidated Company, from 1990 until I was terminated on August 9, 2012. "4C's " is what we called the company. 4C's is principally engaged in the business of operating cafeterias and vending machines in industrial plants and office locations. 4C's is owned by, and operated as a division of, Cayman Corporation.
3. I was 56 years old on the day I was terminated by 4C's
4. Ed Williams is the Vice-President of 4C's and was my direct supervisor. Mr. Williams is also a Cayman Vice-President.
5. From the day I was hired in 1990 until the end of 2011, I was the General Manager of "4C's North", a region of 4C's headquartered in Burlington, North Carolina.

6. Under my management, 4C's North showed significant improvement in [its] financial performance in 2011. I was able to streamline our costs while at the same time increase our operations in the region. I was the only General manager to accomplish this task in the history of 4C's.

7. During this time period, my job performance rating also increased significantly, from "competent minus" for 2010 to `commendable minus" for 2011. Mr. Williams was the person who evaluated me. My 2011 rating of "commendable minus," was a significantly better rating. In fact, it is the second highest rating an employee can get at 4C's.

8. In addition, during this same time period, I also earned an incentive bonus of $37,000, which was the largest bonus awarded in the company that year. I was told by both Mr. Williams and Mr. Ted Arts, that the incentive bonus was for my hard work and to let me know I was a valuable asset to the company.

9. During this same time period, 4C's South, another region of the company, headquartered in Charlotte, North Carolina, did not perform so well in 2011. Therefore, in December 2011 Mr. Williams came to me and discussed the possibility of taking over the South region. Mr. Williams felt I could do for the South region what I did for the North region. I opted to accept Mr. Williams's offer of a transfer to 4C's South as General Manager because I relished the challenge of turning that region around.

10. Even though I was transferred to 4C's South, Mr. Williams remained my supervisor.

11. I started work in Charlotte in early 2012. Because the south region was in such bad shape and had been so poorly managed, I told Mr. Williams that I expected it would take me about 18 months to make 4C's South profitable. Mr. Williams stated that he understood and that the company was not expecting an immediate turnaround in the condition of the South Region and that they had confidence in me.

12. Beginning on July 10, 2012 Mr. Williams began a two stage process that forced me out of my job. First, Williams assigned responsibility for a portion of my territory in 4c's South to 4C's North, decreasing my territory. I was never informed why this action was being taken. Though I have heard that the reason for this action was because I allegedly had problems with some accounts, I was unable to respond to these alleged "problem accounts" because Mr. Williams did not identify the accounts to me. Every time I tried to talk with Mr. Williams about this he always said that I worried too much.

13. In my opinion, I felt that I was proceeding as quick as was advisable in undertaking the turnaround of 4C's South.

14. The only problem that I am aware of that we had in the South region was that we did have a problem involving food delivery in some of our refrigerated trucks. Some of our trucks had not been properly inspected by the maintenance division for repairs and several of them were detained by the Highway Department for safety violations. The resulting delay caused some problems with some of our accounts. As soon as I was made aware of what had happened, I took steps to get the trucks fixed, and I even reprimanded

the responsible manager about the delay in repairs. The manager I reprimanded was Mr. Williams' nephew. Mr. Williams never has said anything to me about this incident.

15. In any event, neither Mr. Williams nor anyone with the 4C's made any claim that 4C's South's financial condition was any worse than it had been when I arrived six (6) months earlier. In fact, Mr. Williams stated to me on more than one occasion that I "made progress with individual accounts and 4C's South made improvements."

16. In mid-June, 2012, around the 14th, Mr. Williams and I were in a company conference room watching the Monday playoffs of the U.S. Open Golf Tournament. I said that I didn't think I could walk and play 18 holes of golf five days in a row. In response, Mr. Williams said that "that's obvious, you're too damn old." He also made a reference to the fact that if I went to the gym I would be in better shape.

17. Furthermore, in the mid to latter part of July 2012, Mr. Williams came into my office and said to me,"O'Callahan, you are too damn old for this kind of work and I think you should consider retiring."

18. In response to Mr. Williams, I said to the Human Relations Manager, Allison Young, who was seated in another office nearby but within earshot, "Allison, did you hear that?" I could see the shock on her face at hearing what Mr. Williams had just said to me.

19. Then, in late July 2012, I heard that Mr. Ted Arts, the President of Cayman Corporation, instructed Mr. Williams to consolidate all Cayman and 4C's operations in North and South Carolina into a single region to be run by Mr. Williams, and to combine the management responsibilities previously handled by Cayman's South Carolina Regional Vice President

Ted Finnell, by Mike Kiser, in 4C's North, by me in 4C's South, and by Alan Hunter in Cayman's Raleigh-Greensboro operation.

20. On August 7, 2012, two days before I was terminated, Mr. Williams, another employee, Alan Hunter, Philip Dennis, and I were in a company car on company business. Alan Hunter said he was about to turn 57 and Mr. Williams made some comment about "isn't getting old a pain...I am sure glad I am not as old as you guys". He also made some reference to the fact that we should be in as good physical condition as he was and work out at the gym.

21. On August 9, 2012, I was terminated. At the same time, Alan Hunter in Cayman's Raleigh-Greensboro operation, age 56, was demoted to commission salesman. 4C's South and Cayman's South Carolina operation were combined under Ted Finnell, age 40, and Cayman's Greensboro-Raleigh operation and 4C's North were combined under Mike Kiser, age 35.

22. I believe the reason I was terminated was because of my age; the fact the company could hire younger employees and pay them lower salaries; and the fact that I did not fit the company's new "youth" image.

_____

James O'Callahan

CASE NO. 2015-31164

JAMES O'CALLAHAN	§	IN THE DISTRICT COURT
PLAINTIFF	§	
VS.	§	OF TRAVIS COUNTY, TEXAS
	§	
CONTINENTAL CATERING	§	
CONSOLIDATED COMPANY	§	222ND JUDICIAL DISTRICT
DEFENDANT		

AFFIDAVIT OF TED ARTS

1. My name is Ted Arts. I am over the age of twenty-one and have never been convicted of a crime or offense involving moral turpitude. I am fully authorized and competent to execute this Affidavit on behalf of continental Catering Consolidated Company (4C's). I was the President of 4C's and Cayman Corporation and I am currently the President of 4C's and Cayman Corporation. I have personal knowledge of all facts stated herein, and such facts are true and correct.
2. 4C's is a vending and food services company, which, although separately incorporated, is wholly owned by, and functioned as an operating division of, Cayman Corporation. Continental Catering Consolidated Company is a wholly-Owned subsidiary of Cayman Corporation.
3. I am 42 years old. I am an avid athlete and believe a sound and strong body is essential to having a successful career, regardless of what career a person chooses. I work out everyday at the gym during lunch with some fellow coworkers, Ed Williams, Mike Kiser and Ted Finnell.

4. In mid to late July 2012, I instructed Ed Williams to consolidate all Cayman and 4C's operations in North and South Carolina into a single region run by Williams, and to combine the management responsibilities previously handled by Cayman's South Carolina Regional Vice President Ted Finnell, by Mike Kiser in 4C's North, by O'Callahan in 4C's South, and by Alan Hunter in Cayman's Raleigh-Greensboro operation.
5. I further informed Ed Williams that the North Carolina region would be consolidated with Cayman's South Carolina region, which was then managed by Ted Finnell, a Regional Vice President.
6. We reduced from four to two the number of persons doing General Manager work. This reduction saved the company several thousand dollars a month.
7. I selected Ed Williams to manage the consolidated "Carolinas Region" and instructed him to restructure the management responsibilities previously handled by Finnell and the three North Carolina district managers into a more streamlined organization.
8. In making our management selections [for the two jobs], we considered the capabilities of Finnell and Kiser, Hunter and O'Callahan.
9. It was just a "coincidence" that led to O'Callahan's leaving the company after the consolidation process. This company has no animus against older employees in our company. We abide by the law and do not discriminate against any individuals because of their age. We value our older employees after all, many jobs, especially managerial and professional jobs, require this sort of experience that only employees over 40 are likely to have.

10. O'Callahan made progress with individual accounts and 4C's South made some improvement during his tenure. However, O'Callahan was not selected for either new District position. These new Districts were significantly larger in numbers of accounts and employees and O'Callahan's territories had just recently been reduced because of our concerns over his performance. As a result of the elimination of O'Callahan's job in this consolidation, O'Callahan's employment ended.
11. 4C's South and Cayman's South Carolina operation were combined under Ted Finnell and Cayman's Greensboro-Raleigh operation and 4C's North were combined under Mike Kiser. The change was made because of O'Callahan's slow responses in reacting to individual problem accounts and my recent discovery that O'Callahan had not responded in a timely way to a problem involving food delivery in unrefrigerated trucks. Moreover, O'Callahan's region was losing money and was therefore not profitable for the company. Furthermore, it is my understanding that Williams had reduced O'Callahan's territory on July 10 because of slow response to problem accounts and the unrefrigerated truck problem. Consequently, O'Callahan was not a contender for the August job.
12. We did not select O'Callahan to manage one of the two districts because they served a greater number of customers, entailed more accounts, covered a substantially larger geographic territory, and O'Callahan was slow in responding to problem accounts.
13. Finnell or Kiser had no such performance problems.

14. A critical factor in not selecting O'Callahan was the fact that even before the second reorganization, Williams had reduced the size of O'Callahan's territory from six territories to three. Given that O'Callahan was slow with his already reduced territory, we concluded that he could not handle an even larger region.

15. I have, however, heard rumors from some of our employees that some people in management have made comments regarding certain employees' ages. For example, "the company needs young blood". I personally have never heard anyone in this company make any such comments and do not believe that such comments were ever made.

16. It should be clearly understood that O'Callahan's age played no part in his separation of employment from 4C's. We had to make a legitimate business decision for the benefit of the company and unfortunately it was not to his advantage. Although Hunter's management position also was eliminated. He was not terminated or demoted; rather, he was assigned to a sales position.

17. Last year I was charged with income tax evasion by the IRS for filing a false tax return regarding the profits of Cayman. I have denied these charges and we are fighting this allegation in court.

_____

Ted Arts, President

CASE NO. 2015-31164

JAMES O'CALLAHAN	§	**IN THE DISTRICT COURT**
PLAINTIFF	§	
VS.	§	**OF TRAVIS COUNTY,**
TEXAS	§	
CONTINENTAL CATERING	§	
CONSOLIDATED COMPANY	§	**222ND JUDICIAL DISTRICT**
DEFENDANT		

AFFIDAVIT OF EDWARD WILLIAMS

1. My name is Edward Williams. I am over the age of twenty-one and have never been convicted of a crime or offense involving moral turpitude. I am fully authorized and competent to execute this Affidavit of behalf of Continental Catering Consolidated Company (4C's). I was the Vice-President of 4C's and I am currently the Vice-President of 4C's. I have personal knowledge of all facts stated herein, and such facts are true and correct. I am also an officer of Cayman Corporation.
2. 4C's is a vending and food services company, which, although separately incorporated, is wholly owned by, and functioned as an operating division of,Cayman Corporation. Continental Catering Consolidated Company is a wholly owned subsidiary of Cayman Corporation.
3. I am 39 years old and one of the youngest officers of 4C's. I believe that the more physically fit an individual is the more productive the individual is. Consequently, I go the gym every day and work out.
4. Mr. James O'Callahan began working for Consolidated in 1990. In 2012, just prior to his leaving the company, O'Callahan held the position of General/District Manager for

Continental's South District and reported directly to me, the Regional Vice President in charge of Continental's North Carolina operations. I also supervised a Cayman district covering Raleigh and Greensboro, North Carolina, managed by Allen Hunter, and Continental's North District, managed by Mike Kiser, which included a number of territories in North Carolina and one territory in South Boston, Virginia.

5. O'Callahan was originally assigned as manager of 4C's North. Under his management 4C's North showed "significant improvement in [its] financial performance" in 2011. Consequently, O'Callahan's job performance rating also increased significantly, from "competent minus" for 2010 to "commendable minus" for 2011.

6. In 2011, I personally awarded O'Callahan an incentive bonus. I believe it was one of the highest incentive bonuses ever awarded in the company's history. Like any successful company, we reward employees when they are deserving of reward and take remedial action when an employee it not performing as expected, which sometimes includes termination of employment.

7. During this same time period 4C's South, another of our regions, headquartered in Charlotte, North Carolina, did not perform so well in 2011. Our projected goals for 4C's South were not achieved. O'Callahan came to me and specifically requested that I transfer him to 4C's South as the new general manager. O'Callahan stated that he could turn that region around in no time. All it needed he said was a good General Manager at the helm and he was the man.

8. Though I praised him for his efforts in 4C's North, I told O'Callahan that 4C's South was a completely different region and that he could not rely on his laurels for the success in 4C's North in this region. I do not recall O'Callahan telling me that he expected it would take him about 18 months to make 4C's South profitable. I do remember a discussion regarding the need to have 4C's South as profitable as soon as possible because it was losing too much money for the company.

9. In December 2011, I transferred O'Callahan to 4C's South as General manager. At all times, even after the transfer, I remained O'Callahan's supervisor.

10. O'Callahan's last performance review, covering 2011, was "commendable minus."

11. In early July 2012, I reduced O'Callahan's territories by reassigning one-half of his territories to Kiser. I did this because of O'Callahan's slow response to problem accounts.

12. I discovered that O'Callahan had failed to respond timely to a problem involving the delivery of food in unrefrigerated trucks. I was also informed that several of his accounts were complaining about O'Callahan's lack of attentiveness to their needs.

13. After I reduced O'Callahan's territories, Mr. Ted Arts, President of Cayman informed that the North Carolina region would be consolidated with Cayman's South Carolina region, which was then managed by Ted Finnell, a Regional Vice President.

14. Arts selected me to manage the consolidated "Carolinas Region" and instructed me to restructure the management responsibilities previously handled by Ted Finnell and the three North Carolina district managers into a more streamlined organization. I then combined the two (2) regions into two (2) large districts: a "South District" consisting of

Finnell's South Carolina region, O'Callahan's remaining territories and the three (3) territories previously reassigned from O'Callahan to Kiser; and a "North District", which consolidated Kiser's and Hunter's previous territories.

15. I selected Finnell to supervise the South District and Kiser to supervise the North District.

16. Finnell had been a Regional Vice President and his qualifications to supervise a large territory were well known to Arts and me. I had directly supervised him for many years before Finnell's promotion to Vice President.

17. Kiser also had shown that he was a capable performer. In fact, he was assigned responsibility for half of O'Callahan's territories concurrently with O'Callahan's July 2012 reduction of assigned territories.

18. Crucial to selecting the managers for the new districts was the fact that there were substantially greater management responsibilities that had been required under the previous organizations and the new districts were substantially larger in geographic area. I selected Finnell and Kiser because I was Finnell's former direct superior, had firsthand knowledge of both men's work and abilities, and considered them competent to handle the greater responsibilities and larger geographic territory.

19. I did not select O'Callahan for either new District position. These Districts were significantly larger in size, numbers of accounts and employees and O'Callahan's territories had just recently been reduced because of my concerns over his performance.

As a result of the elimination of O'Callahan's job in this consolidation, O'Callahan's employment ended. Although Hunter's management position also was eliminated, he was not terminated or demoted; rather, he was assigned to a sales position.

20. Furthermore, I did not know of this reorganization when I reduced O'Callahan's territory on July 10. My conversation with him could have occurred immediately after Arts told me to reorganize: the directive from Arts could have occurred in late July. However, I have no documents fixing the date of the instructions to consolidate.

21. On August 9, O'Callahan was relieved of his duties at 4C's and Alan Hunter, age 57, was reassigned to commission salesman. My reasons for reducing O'Callahan's territory was his performance as compared to Finnell's performance.

22. I can assure you that O'Callahan's discharge was based on reasonable factors and that his age played no part in the decision making process. I do not ever remember saying anything like "its about time we started to get some young blood in this company." O'Callahan's performance problems had led to a significant reduction of his territories prior to my learning that Arts had decided to consolidate the North and South Carolina regions.

23. I cannot remember any conversation with Philip Dennis the day after O'Callahan's discharge. Considering he is O'Callahan's brother-in-law, it does not surprise me that he would spread rumors about the reason for O'Callahan leaving the company.

24. As far as the alleged comments I made to O'Callahan, I cannot remember ever saying anything about his age. If any comments were made, they were made in a joking manner, between friends. O'Callahan is trying to take friendly joking between colleagues and turn it into a case for illegal discrimination. The simple fact is that O'Callahan had performance problems; did not make the south region profitable and was not qualified for the new position. The only person he should blame for his termination is himself; not me or the company.

25. In December 2012, I was sentenced to two years' probation for negligent supervision of my 98 year old great grandfather for whom I was appointed legal guardian. Adult Protective Services said I failed to properly supervise him when he was injured falling down some stairs and that I failed to properly take care of his basic needs. Though I denied the charges, my sister was appointed his new guardian.

_____

Edward Williams,
Vice President

CASE NO. 2015-31164

JAMES O'CALLAHAN	§	IN THE DISTRICT COURT
PLAINTIFF	§	
VS.	§	OF TRAVIS COUNTY, TEXAS
	§	
CONTINENTAL CATERING	§	
CONSOLIDATED COMPANY	§	222ND JUDICIAL DISTRICT
DEFENDANT		

AFFIDAVIT OF MIKE KISER

1. My name is Mike Kiser. I am over the age of twenty-one and have never been convicted of a crime or offense involving moral turpitude. I am fully authorized and competent to execute this Affidavit on behalf of Continental Catering Consolidated Company (4C's). I am the North District General Manager of 4C's. I have personal knowledge of all facts stated herein, and such facts are true and correct.
2. I had worked for 4C's for three (3) years before being assigned to 4C's North.
3. I am 35 years old. I am an avid athlete and work out everyday at the gym with others from the 4C's.
4. In mid to late July 2012, I was called into a meeting with Mr. Williams and Mr. Ted Arts. I was informed that Mr. Williams was going to consolidate all Cayman and 4C"s operations in North and South Carolina into a single region to be run by Mr. Williams. The company was also going to combine the management responsibilities previously handled by me in 4C's North, Cayman's South Carolina Regional Vice President Ted Finnell, by O'Callahan in 4C's South and by Alan Hunter in Cayman's Raleigh-Greensboro operation. I was told that the decision was made for financial reasons.

5. I was further informed by Mr. Williams that the North Carolina region would be consolidated with Cayman's South Carolina region, which was then managed by Ted Finnell, a regional Vice President.

6. At this time, which was about a month prior to O'Callahan's leaving the company, Mr. Williams discussed with me the possibility of taking on more territories. Mr. Williams said that he and Mr. Arts had determined that I was better able to handle a larger number of territories than O'Callahan. About a month later, Mr. Williams transferred three of O'Callahan's territories to me.

7. The territories I received from O'Callahan were not doing well financially. However, with a few months, I was able to make it profitable.

8. I was not surprised to learn that O'Callahan was losing some of his territories. I knew that O'Callahan had done a good job while managing the 4C's North region, but cannot say the same for his management of 4C's South. I also know that O'Callahan also had problems with some of his accounts. I got several calls from irate clients regarding O'Callahan's handling of their accounts. I was told that he was consistently late on deliveries and not responsive to their needs. The reason these clients called me was because I had serviced them in the past.

9. O'Callahan also complained a lot about how he was tired of working himself to the bone and that the idea of retirement sounded good to him. On one occasion, as I was leaving the office to go to the gym, O'Callahan said to me "I wish I was as young as you and had

your energy…I'm just getting to old for this job." It was no secret that O'Callahan was slowing down and thinking about retiring soon.

10. I have never heard any sort of rumors about 4C's ever treating any of its employees differently because of their age. I did, however, here that Philip Dennis, Jim's brother-in-law was spreading a rumor that the reason Jim was fired was because of his age.

11. I have also heard rumors that Allison Young was fired because of her age. Allison was fired because she stole money from 4C's I know this because I am the person that caught her endorsing company checks to herself and reported her to Mr. Arts. After discussing this matter with both Mr. Arts and Mr. Williams, I was instructed to fire her, which I did. Out of respect for Ms. Young, we never told her that the reason she was being fired was because she had stolen money from the company. Because of her age the company decided it would be better to just let her go and not file any charges against her. We did not want to publicly announce that she was a thief.

12. I often saw O'Callahan and Ms. Young having lunch together and I was aware that they were very close friends having known each other since they were children. In fact. Ms. Young and myself are the godparents of one of O'Callahan's grandsons.

13. I got the promotion because I was the best qualified person for the job. Consequently, I am certain that the reason I got the position was because I had better performance ratings than O'Callahan.

14. I have never heard any employee or officer of this company ever make any comments about an employee's age.

15. With respect to any birthday bonus policy, I have never heard of such a policy. That is, no such policy has ever been implemented. However, that does not mean it was not considered.

_____

Mike Kiser

4C's

CONTINENTAL CATERING CONSOLIDATED COMPANY

PERFORMANCE EVALUATION MEMORANDUM

TO: Allison Young, Human Resources

FROM: Ed Williams

RE: James O'Callahan

DATE: 12-29-11

I have reviewed Mr. O'Callahan's performance in the North Region. Mr. O'Callahan has performed very well and was very responsive to the needs of his clients. Mr. O'Callahan was able to streamline our costs while at the same time increase our operations in the region. I therefore am awarding Mr. O'Callahan an incentive bonus of $37,000.00 and am giving him a performance evaluation of COMMENDABLE MINUS. This rating is a significant improvement from his 2010 performance rating of COMPETENT MINUS. Please place this memo in his permanent personnel file and give a copy to Mr. O'Callahan.

CC

CAYMAN CORPORATION

PERFORMANCE EVALUATION MEMORANDUM

TO: Allison Young, Human Resources

FROM: Ed Williams

RE: Ted Finnell

DATE: 12-29-11

I have reviewed Mr. Finnell's performance in the Cayman's South Carolina Region. Mr. Finnell has performed well and has moderately improved the financial condition of the South Carolina Region. Mr. Finnell, however, should focus his energies on improving the cost cutting programs he has recently implemented. Though Mr. Finnell has met most of his goals, he still needs to improve on customer relations. While his relationship is good, there is still room for improvement. I am giving him a performance evaluation of COMPETENT MINUS. This rating is a consistent with his 2010 performance rating of COMPETENT MINUS. Please place this memo in his permanent personnel file and give a copy to Mr. Finnell.

4C's / CC

MEMORANDUM

TO: ALL EMPLOYEES

FROM: ED WILLIAMS

RE: GEOGRAPHIC TERRITORIES

DATE: JANUARY 10, 2012

Please be aware of the following territory assignments:

Kiser	*Hunter*	*O'Callahan*
4C's North Manager	**Cayman Manager**	**4C's South Manager**
Burlington	Raleigh	Charlotte
Smithfield	Greensboro	Laurinburg
Tarboro	Shelby	
Hickory		
Asheville		
Albemarle		
South Boston		

4C's

MEMORANDUM

TO: ALL EMPLOYEES

FROM: ED WILLIAMS

RE: JANUARY 2012 GEOGRAPHIC TERITORIES

DATE: JANUARY 3, 2012

Please be aware of the following territory assignments:

Kiser	*Hunter*	*O'Callahan*
4C's North Manager	**Cayman Manager**	**4C's South Manager**
Burlington	Raleigh	Charlotte
South Boston	Greensboro	Laurinburg
Tarboro	Shelby	Hickory
Albemarle		Asheville
		Smithfield

4C's / CC

MEMORANDUM

TO: ALL EMPLOYEES

FROM: ED WILLIAMS

RE: GEOGRAPHIC TERRITORIES

DATE: August 2012

Please be aware of the following territory assignments for the new CAROLINAS REGION:

Finnell	**Kiser**
Southern District	Northern District
Charlotte	Burlington
Shelby	Smithfield
Laurinburg	Tarboro
Greenville	Raleigh
Spartanburg	Greensboro
Columbia	South Boston
Hickory	
Asheville	
Albemarle	

Summary of Age Discrimination in Employment Act

Plaintiff, James O'Callahan sued his former employer, Continental Catering Consolidated Company (4C's), alleging that as a result of its August 2012 reorganization, 4C's unlawfully discharged him due to his age, in violation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§621-634 (hereinafter "the ADEA"). Section 4 of the ADEA, 29 U.S.C. §623(a), provides that **"It shall be unlawful for an employer (1) to … discharge any individual … because of such individual's age."** Section 12 of the ADEA, 29 U.S.C.§631, entitled "Age limits," provides (a) **Individuals at least 40 years of age.** The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

What Section 623 makes unlawful is adverse treatment, including discharge, "because of such individual's age." Under Section 623, such discrimination is prohibited regardless of the age of the person who benefits from the discrimination. The statute does make it relevant whether the individual claiming discrimination is over age 40, because under Section 631 only persons over age 40 may claim discrimination. But even Section 631 does not purport to authorize discrimination in favor of persons at the younger end of the protected range of ages.

Section (f) of the statute, 29 U.S.C. §623(f), creates a number of exceptions to the general rule against discrimination on the basis of age. For example, an employer does not violate the ADEA by following a bona fide seniority system, 29 U.S.C §623(f)(2)(A), or by making certain kinds of payments under an employee benefit or early retirement incentive plan that meets various specific requirements. 29 U.S.C §§623(f)(2)(B), 623(i), 623(1). And the employer is expressly authorized by 29 U.S.C §631(c) to compel retirement by employees over 65 who hold bona fide executive or high policy-making positions, so long as their retirement benefits have a minimum value.

That Congress deliberately structured the ADEA to protect older members of the protected class against younger members of that class is also clear from the legislative debates that preceded passage. Thus, when the ADEA was introduced in the Senate, Senator Javits stated:

> "Section 4 of the Bill specifically prohibits discrimination against any "individual" because of his age. It does not say that the discrimination must be in favor of someone younger than age 40. In other words, if two individuals ages 52 and 42 apply for the same job and the employer selected the man age 42 … because he is younger than the man age 52, then he will have violated the act…" 113 Cong. Rec.31,255 (1967).

Senator Yarborough, the floor manager of the bill, expressly agreed with this analysis. Id.

Moreover, a long-standing regulation of the Equal Employment Opportunity Commission (EEOC) has incorporated this analysis. According to 29 C.F.R §1625(a), "It is unlawful in situations where this Act applies, for an employer to discriminate in hiring or in any other way by giving preference because of age between individuals 40 and over."

Few employers admit to the discriminatory state of mind which is the ultimate issue in an employment discrimination case. The United States Supreme Court has therefore created a *prima facie* case which raises a presumption of employment discrimination, because it eliminates the most common reasons for adverse employer action. *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) (Title VII). This inference of discrimination serves to call forth from the employer an articulation of its reasons for the adverse action.

The establishment of a *prima facie* case is only the first step in proving a violation of a particular statute. The ADEA prohibits discrimination "because of … age," 29 U.S.C. §623(a)(1), not because of membership in a class of persons over 40 years of age. Thus a violation of the ADEA does not, unlike a violation of Title VII (statute prohibiting discrimination based on race, religion, sex or national origin), turn on proof of a binary characteristic such as race or gender, but on age, which is a matter of degree. Replacement by a person either inside or outside the protected age group may therefore create an inference of age discrimination. The legislative history and the policy of the ADEA to protect all employees over age 40 also support this interpretation.

Nearly 30 years after the ADEA was passed in 1967, it is the rare supervisor—no matter how prejudiced—who is so incautious as to tell an employee who has just been fired that the reason for the discharge is that the employee is too old, any more than employers tell workers that they are being fired for being black, Jewish or female. Instead, employers who want to be rid of older employees normally invent a reason or reasons, relating to the employee's alleged inability to perform the functions of the job, which although purportedly neutral are a pretext for discriminatory animus. As Circuit Judge Posner has explained in a Title VII discrimination case, because most employment decisions involve an element of discretion, alternative hypotheses (including that of simple mistake) will always be possible and often plausible. Only the very best workers are completely satisfactory, and they are not likely to be discriminated against—the cost of discrimination is too great. The law tries to protect average and even below-average workers against being treated more harshly than would be the case if they were of a different [protected class], but it has difficulty achieving this goal because it is so easy to concoct a plausible reason for not hiring, or firing, or failing to promote, or denying a pay raise to, a worker who is not superlative. *Riordan v. Kempiners*, 831 F.2d 690, 697-698 (7th Cir.1987). For this reason, the task of the fact-finder in most age discrimination cases, as in other kinds of discrimination cases is to sort through various pieces of circumstantial evidence, including generalized expressions of animus (if the plaintiff is fortunate enough to be able to discover them), relative qualifications of the fired and the unfired, statistical evidence and the like, from which discriminatory motive may be inferred.

In *McDonnell Douglas*, where the plaintiff claimed that he had suffered a discriminatory refusal to rehire based on his protests against alleged Title VII violations, the United States Supreme Court held that a plaintiff establishes a *prima facie* case by showing:

> (i) that he belongs to a racial minority;
> (ii) that he applied for and was qualified for a job for which the employer was seeking applications;
> (iii) that, despite his qualifications, he was rejected; and
> (iv) that, after his rejection, the position remained open and the employer continued to seek applications from persons of complainant's qualifications.

In applying the standard above to an age discrimination case, to establish a *prima facie* case of age discrimination, the plaintiff mush show:

1) **S/he is 40 years of age or older when he was discharged, and so is within the class of workers protected against age discrimination;**
2) **s/he was discharged or demoted;**
3) **at the time of discharge or demotion, s/he was performing his job at a level that met his/her employer's legitimate expectations;**
4) **following his/her discharge or demotion, s/he was replaced by someone of comparable qualifications who is younger**.

In other words, to succeed on an ADEA claim the plaintiff must establish the following elements:

(1) that s/he … was an employee covered by the ADEA,
(2) who suffered an unfavorable action by an employer covered by the ADEA, and
(3) that age was a determining factor in the action in the sense that **but for** employer's intent to discriminate on the basis of age the plaintiff would not have been subjected to the employment action.

A *prima facie* case is a presumption, a subset of circumstantial evidence which alters, in favor of the plaintiff, the normal requirements of circumstantial proof. This is done for reasons of probability and from considerations of relative access to proof and the need to effectively implement the national anti-discrimination policy. But the function of the *prima facie* case is not to make the final determination, but simply to move the case to the next stage of analysis, where the employer must put forward its legitimate reasons for action.

Assuming that the plaintiff can establish this *prima facie* case, the **burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection."**

Finally, assuming that the employer can articulate such a reason, the **burden then shifts back to the plaintiff to prove that, notwithstanding the arguable reason, the real reason for the adverse action was forbidden discrimination.**

Having served this function, the *prima facie* case raises merely an "inference of discrimination" because it may be presumed that, if there is no explanation for the facts, it is more likely than not that the decision was based on impermissible criteria. Once the inference is created, the employer need do no more than produce "some evidence" that it had a legitimate, nondiscriminatory reason for its decision; this is only a burden of production, not a burden of proof. And, most important, **the burden of proving discrimination rests at all times on the plaintiff;** once the employer's burden of production has been met, the presumption furnished by the *prima facie* case vanishes, and **the question is whether, considering all the evidence, the plaintiff has proved his case by a preponderance of the evidence.** *St. Mary's Honor Center v. Hicks,* 113 S. Ct. 2742, 2749 (1993).

While derogatory remarks may be direct evidence of age discrimination the decisional law 'clearly reflects that isolated and ambiguous statements … 'are too abstract, in addition to being irrelevant and prejudicial, to support a finding of age discrimination,' "*Gagne v. Northwestern Nat's Ins. Co.,* 881 F.2d309,314 (6th Cir.1989) (quoting *Chappell v. GTE Prods. Corp.,* 803 F2d 261, 268 (6th Cir.), *cert. denied,* 480 U.S. 919,107 S. Ct. 1375, 94 L.Ed.2D 690 (1987)). Discriminatory remarks concerning age, therefore cannot be stray or isolated statements. According to the Seventh Circuit, "[u] nless the remarks upon which plaintiff relies were related to the employment decision in question, they cannot be evidence of a discriminatory discharge." *McCarthy v. Kemper Life Ins. Co.*, 924 F.2d 683, 686-87 (7th Cir. 1991). There must be some nexus between the alleged discriminatory statements and any of the employment decisions made by the employer. See Figures v. Board of Pub. Utils., 967 F2d 357, 360-61 (10thCir.1992)(noting that racial comments are not probative of discrimination unless they are lined to the challenged action); *Merrick v. Farmers Ins. Group,* 892 F.2d 1434, 1438-39 (9th Cir.1990)(holding that certain statements unconnected to the employment decision-making process are simply stray remarks that do not demonstrate discriminatory intent).

The general burdens of proof for employment discrimination cases was set forth by the Supreme Court as follows:

(1) The plaintiff has the burden of proving by the preponderance of the evidence a *prima facie*[1] case of discrimination.

(2) If the plaintiff succeeds in proving the *prima facie* case of discrimination, the burden shifts to the defendant "to articulate or come forward with, some legitimate, nondiscriminatory reason for the employer's action."

(3) Should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext (disguise or cover) for discrimination.

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253-54 (1981). See also *Elliott v. Group Medical & Surgical Service,* 714 F2d 556,562 (5th Cir. 1983), cert. denied, 467 U.S. 1215 (1984).

If the Plaintiff cannot establish the existence of a *prima facie* case of discrimination, the Plaintiff has failed to prove its case and verdict in favor of the Defendant is appropriate.

If the Plaintiff can establish a *prima facie* case of discrimination, the Defendant can defend its actions by showing it had a legitimate, non-discriminatory reason for its decision, i.e., it terminated the Plaintiff because s/he was not properly performing his job. Once the Defendant articulates a legitimate, nondiscriminatory reason, the Plaintiff must show that this reason is not true or a pretext. This requirement can be met 'either directly by persuading the court that a discriminatory reason more likely motivated the employer, or indirectly by showing that the employer's explanation is unworthy of credence." *Burdine*, supra, 450 U.S. at 256. This burden cannot be satisfied merely be asserting that the employer made a poor, or even incorrect, business decision. See, e.g., *Sherrod v. Sears, Roebuck and Co.*, 785 F2d 1312 (5th Cir. 1986) (finding plaintiff could not prevail where he failed to introduce evidence that evaluations by five supervisors concerning poor performance were pretextual).

The Supreme Court has clarified the proof necessary to show pretext and stressed that there must be evidence of intent to discriminate in order for a plaintiff to prevail. It is not sufficient that the employee merely dispute the employer's reason, even if that reason is eventually found to be incorrect, as the Plaintiff must prove intent on the part of the employer. *St. Mary's Honor Center v. Hicks,* 113 S. Ct. 2742 (1993). In other words, the Plaintiff must show evidence that his/her being HIV positive more likely than not. Therefore, both the Plaintiff's *prima facie* case of discrimination and the proof that the Defendant' offered reason for its employment decision is false should be established in the Plaintiff's case-in-chief and through cross-examination.

[1] *Prima facie* evidence which, if unexplained or contradicted, is sufficient to sustain a judgment in favor of the issue which it supports, but may be contradicted by other evidence. Evidence good and sufficient on its face; such evidence as, in the judgment of the law, is sufficient to establish a given fact constituting the party's claim or defense, and which if not rebutted or contradicted, will remain sufficient.

SELECTED CASES FOR PARTICIPANTS IN TEXAS SUPREME COURT

Rhodes v. Guiberson Oil Tools, 75 F.3d 989 (5th Cir. 1996)

Brown v. CSC Logic, Inc., 82 F.3d 651 (5th Cir. 1996)

Price v. Marathon Cheese Corp., 119 F.3d 330 (5th Cir. 1997)

Bodenheimer v. PPG Indus., Inc., 5 F.3d 955 (5th Cir. 1993)

**Portions of the above cases that are not relevant to your case have been deleted.