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FOR SOCIAL RESPONSIBILITY

# **YMCA NATIONAL JUDICIAL COMPETITION 2016 MOCK TRIAL CASE MATERIALS**

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CONTINENTAL  
MANSAIL DIVISION

KELLY GUNNAR,  
*PLAINTIFF*

VS.

CONTINENTAL CATERING  
CONSOLIDATED COMPANY  
*DEFENDANT*

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CIVIL ACTION 867-CV-5309-D

## STIPULATIONS

1. All exhibits and witness statements included in the problem are authentic in all respects and no objections to the authenticity of the exhibits shall be entertained.
2. Stipulations cannot be contradicted or challenged.
3. The signatures on all documents are authentic.
4. There are **NO** costume options permitted.
5. The Charge of the Court is accurate in all respects, therefore no objections to the Charge shall be entertained.
6. Chain of custody for evidence is not in dispute.

## WITNESSES

1. Plaintiff witnesses may not be called on behalf of the Defendant.
2. Defense witnesses may not be called on behalf of the Plaintiff.
3. All witnesses may be female or male.
4. WITNESSES MAY BE CALLED IN ANY ORDER.

*The following witnesses must be called by the parties:*

### **For the Plaintiff**

Knox Roland

Chris Thompson

Kelly Gunnar

### **For the Defense**

Brady Norman

Sandy Cole

Taylor Adams

## DOCUMENTS

*Teams may use pre-marked exhibits to be referred to by number as follows:*

1. Plaintiff's Original Petition
2. Performance review for Kelly Gunnar
3. Performance review for Anne Mabie
4. Affidavit of Knox Roland
5. Affidavit of Chris Thompson
6. Affidavit of Kelly Gunnar
7. Affidavit of Brady Norman
8. Affidavit of Sandy Cole
9. Affidavit of Taylor Adams
10. July 10, 2010 Geographic Territories
11. January 2010 Geographic Territories
12. August 2010 Geographic Territories

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KELLY GUNNAR  
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CIVIL ACTION 867-CV-5309-D

**PLAINTIFF'S ORIGINAL PETITION**

**NOW COMES**, Kelly Gunnar, Plaintiff, in the above-entitled and number case and files this suit against Continental Catering Consolidated Company, Defendant, and for cause of action would show the following:

**I.**

**INTRODUCTION**

1. This is a case involving the Age Discrimination in Employment Act (ADEA). Plaintiff has received a Right to Sue letter from the Equal Employment Opportunity Commission (EEOC) and seeks relief and damages from defendant for its discrimination against him/her because of his/her age, said discrimination occurring in the form of the termination of his/her employment.

## **II.**

### **JURISDICTION**

2. The court has jurisdiction over this matter pursuant to the ADEA.

## **III.**

### **PARTIES**

3. Plaintiff Kelly Gunnar is an individual who is over 40 years of age.
4. Defendant Continental Catering Consolidated Company (4Cs) is a corporation organized and existing under the laws of the State of Continental. Its agent for service of process is Brady Norman, President.

## **IV**

### **FACTS**

5. Plaintiff was hired by 4Cs as a salesman. Plaintiff was thereafter promoted to General Manager of 4Cs North Region. In December 2009, Plaintiff was reassigned to become the General Manager for 4Cs South Region. Plaintiff oversaw six (6) territories.
6. 4Cs is a vending and food services company, which although separately incorporated, is wholly owned by, and functioned as an operating division of, Desperado Corporation.
7. Plaintiff was a hardworking and successful General Manager for 4Cs having received very high performance ratings. Plaintiff also received one of the largest incentive bonuses in the company's history.
8. In or about July 2010, Defendant, without prior notice or reason, transferred three (3) of Plaintiff's territories to Taylor Adams.

9. In or about mid to late July 2010, all Desperado and 4Cs operations in North and South Carolina were combined into a single region run by Sandy Cole, Vice President of 4Cs. All management responsibilities were consolidated, including those previously handled by Desperado's South Carolina Regional Vice President Anne Mabie, Taylor Adams in 4Cs North, by Plaintiff in 4Cs South, and by Melinda Henderson in Desperado's Raleigh-Greensboro operation.
10. The North Carolina region was consolidated with Desperado's South Carolina region to become the Carolinas Region, which was then managed by Anne Mabie, a Regional Vice President and who was considerably younger than Plaintiff.
11. Sandy Cole and Brady Norman said the reason they were reducing from four to two, the number of persons doing General Manager work, was to save the company money.
12. Just prior to this "restructuring," Sandy Cole had made several comments to Plaintiff about his age, the fact that he was getting "too old to work" and that the "company needed new blood."
13. At or near the end of July 2010, Cole and Norman selected Anne Mabie, an individual considerably younger to replace Plaintiff even though Plaintiff had received a higher performance rating. In making their management selections for the two jobs, Defendant lied when it said it considered the capabilities of Mabie, Adams, Henderson, and Plaintiff.

14. On or about August 10, 2010, Plaintiff was terminated from his/her employment with 4Cs. Said termination was made under the guise of a lack of performance in the handling of his/her duties of employment and the guise of corporate restructuring. The actual reason for plaintiff's termination was discrimination based upon Plaintiff's age.
15. As a direct and proximate result of Defendant's violation of the ADEA, Plaintiff was disallowed to continue his/her employment.
16. Defendants' conduct was willful and wanton, and was designed to deprive Plaintiff of his/her rights as guaranteed under the ADEA, thereby entitling Plaintiff to an award of punitive damages.

**WHEREFORE, PREMISES CONSIDERED,** Plaintiff requests that this court grant the following relief:

- (1) Declare that Defendant's conduct in terminating Plaintiff's employment constituted a violation of the ADEA;
- (2) Order Defendant to pay compensatory and punitive damages;
- (3) Order Defendant to pay Plaintiff's attorneys' fees and costs pursuant to this action; and
- (4) Grant such other and additional relief to which Plaintiff may be entitled.

Respectfully submitted,

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James F. Dewey  
One of the Attorneys for  
Kelly Gunnar  
DEWEY, CHEATHAM & HOWE  
556 Gower Avenue  
Mainsail, Continental 55555  
(555)555-5565  
Dewey4Justice@dch.law

**4Cs**  
**CONTINENTAL CATERING CONSOLIDATED COMPANY**

***PERFORMANCE EVALUATION***  
***MEMORANDUM***

**TO:** Knox Roland, Human Resources  
**FROM:** Sandy Cole  
**RE:** Kelly Gunnar  
**DATE:** 12-29-2009

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I have reviewed Mr./Ms. Gunnar's performance in the North Region. Mr./Ms. Gunnar has performed very well and was very responsive to the needs of his/her clients. Mr./ Ms. Gunnar was able to streamline our costs while at the same time increase our operations in the region. I therefore am awarding Mr./Ms. Gunnar an incentive bonus of \$37,000.00 and am giving him/her a performance evaluation of COMMENDABLE MINUS. This rating is a significant improvement from her/his 2008 performance rating of COMPETENT MINUS. Please place this memo in his permanent personnel file and give a copy to Mr. / Ms. Gunnar.

**DC**  
**DESPERADO CORPORATION**

***PERFORMANCE EVALUATION***  
***MEMORANDUM***

**TO:** Knox Roland, Human Resources  
**FROM:** Sandy Cole  
**RE:** Anne Mabie  
**DATE:** 12-29-2009

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I have reviewed Ms. Mabie's performance in the Desperado's South Carolina Region. Ms. Mabie has performed well and has moderately improved the financial condition of the South Carolina Region. Ms. Mabie, however, should focus her energies on improving the cost cutting programs she has recently implemented. Though Ms. Mabie has met most of her goals, she still needs to improve on customer relations. While her relationship is good, there is still room for improvement. I am giving her a performance evaluation of COMPETENT MINUS. This rating is consistent with her 2008 performance rating of COMPETENT MINUS. Please place this memo in her permanent personnel file and give a copy to Ms. Mabie.

IN THE UNITED STATES DISTRICT COURT  
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MAINSAIL DIVISION

KELLY GUNNAR, §  
*PLAINTIFF* §  
VS. § CIVIL ACTION 867-CV-5309-D  
§  
CONTINENTAL CATERING §  
CONSOLIDATED COMPANY §  
*DEFENDANT* §

**AFFIDAVIT OF KNOX ROLAND**

STATE OF CONTINENTAL §  
§  
COUNTY OF STERRETT §

BEFORE ME the undersigned authority personally appeared Knox Roland, known to me to be the person whose name is subscribed hereto and upon his oath deposed and stated as follows:

1. My name is Knox Roland. 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 (4Cs), from 1980 to December 23, 2010, when I was fired. I was fired just three (3) days after my 50<sup>th</sup> 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 4Cs for thirty years and this is

- how they treat you. I was never told the reason for my discharge. 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 Kelly Gunnar was fired, Anne Mabie was 33 years old, and Taylor Adams was 35 years old.
  5. In June 2010 Mr./Ms. Cole asked me to print out a list of all 4Cs employees with their dates of birth. I asked Mr./Ms. Cole the reason for this list and s/he said very abruptly that it was none of my business. I guess s/he saw the shock on my face and then said that Brady Norman wanted the names and birthdays of all employees because s/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 2010, Mr./Ms. Cole informed me of the consolidation of all Desperado and 4Cs operations in North and South Carolina into a single region run by Mr./Ms. Cole. He/She also told me that s/he was combining the management

- responsibilities previously handled by Desperado's South Carolina Regional Vice President Anne Mabie, by Taylor Adams in 4Cs North, by Kelly Gunnar in 4Cs South, and by Melinda Henderson in Desperado's Raleigh-Greensboro operation.
7. As the person in charge of all personnel matters, I also have knowledge of every employee's performance ratings. Gunnar's 2009 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./Ms. Cole made both of these ratings. It should be noted that Gunnar's 2009 performance rating had been higher than both Adams and Mabie's. In fact, for the several years preceding Kelly's termination, he placed consistently higher within his salary class than did Mabie. Mabie's prior "competent minus" rating meant that she was performing on the low side of competent.
  8. Furthermore, Mr./Ms. Cole had not supervised Mabie since the end of 2009.
  9. At no time did Mr./Ms. Cole ask me for copies of Gunnar's performance ratings at any time prior to his/her termination.
  10. I remember an incident in the latter part of July 2010. Mr./Ms. Cole went into Gunnar's office and said something to the effect of: "Gunnar, you are too dang old for this kind of work . . . I think it's about time for you to be put to pasture if you know what I mean." I also heard him/her say something about retiring, but I am not sure what was said exactly. Gunnar has never spoken to me about retiring. I remember telling Gunnar that Mr./Ms. Cole 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, 2010, Mr./Ms. Cole came to me and told me to prepare the necessary paperwork for Kelly Gunnar's termination, which was to be effective on August 9, 2010. I asked Mr./Ms. Cole why Gunnar was being fired and why wasn't I consulted. Mr./Ms. Cole's response was that the company needed some young blood around here to create a new image. S/he then said that she felt like we were lagging behind because of our "lack of energy," and that it was his/her plan to push the company in a more innovative, "faster-paced" direction. When I asked who was replacing Gunnar, Mr./Ms. Cole said Anne Mabie and Taylor Adams.
12. In my opinion, Mabie and Adams did not simply "replace" Gunnar. Gunnar's last job assignment consisted of managing three (3) North Carolina territories. After the consolidation, Mabie kept all of the company's South Carolina territories in North Carolina, only three of which had been managed by Gunnar just prior to the consolidation. The other three (3) went to Adams.
13. I was aware that Gunnar did have some problems in his region with some of his/her accounts. I was also told there had been a problem with a delivery truck. However, I never got the sense that it was serious or out of the ordinary.

14. It is my opinion that Kelly Gunnar was run out of this company because of his/her age; s/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.

\_\_\_\_\_

Knox Roland

SUBSCRIBED AND SWORN TO BEFORE ME on the \_\_\_\_\_ day of \_\_\_\_\_, 2010, to certify which witness my hand and seal of office.

\_\_\_\_\_

Signature Notary Public

NOTARY INSIGNIA:

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CONTINENTAL  
MAINSAIL DIVISION

KELLY GUNNAR, §  
*PLAINTIFF* §  
VS. § CIVIL ACTION 867-CV-5309-D  
§  
CONTINENTAL CATERING §  
CONSOLIDATED COMPANY §  
*DEFENDANT* §

**AFFIDAVIT OF CHRIS THOMPSON**

STATE OF CONTINENTAL §  
§  
COUNTY OF STERRETT §

BEFORE ME the undersigned authority personally appeared Chris Thompson, known to me to be the person whose name is subscribed hereto and upon his oath deposed and stated as follows:

1. My name is Chris Thompson, 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 (4Cs). I am a salesperson with 4Cs. 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 4Cs as a salesman for five (5) years. I have been in sales for almost twenty-seven years.
3. Kelly Gunnar and I are in-laws, our husbands/wives are sisters/brothers. Kelly got me a job with 4Cs after my previous employer went bankrupt.

4. Kelly was a great asset to 4Cs because of his/her experience and knowledge of the company and the territories. I was able to learn from him/her and make the transition into this new company with great ease. Kelly was always willing to share his/her experience and knowledge with those who asked him/her for advice and a lot of people asked him/her for advice. This was in total contrast to Cole and Mr. Norman who did not seem to care about the people who made up 4Cs. Cole and Mr. Normans' sole concern is profits and cutting costs. On more than one occasion, Cole has said to me in passing that we, meaning 4Cs, 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 4Cs beside the officers of the company are the General Managers and I knew that Cole had no intention of cutting his salary.
5. On August 7, 2010, two days before Kelly was terminated, Cole, Kelly, Melinda Henderson, and myself were in a car on the way to lunch when Melinda made some reference to her upcoming 57<sup>th</sup> cat-themed birthday party that her husband was planning for her. Melinda said that she told her husband not to put all the candles on the cake because it would probably set off the fire alarm and that she did not think she could blow out all the candles. Cole then made some comment about "isn't getting old a pain...I am sure glad I am not as old as y'all"
6. It is common knowledge around 4Cs that Mr./Ms. Cole 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 Cole 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 Knox Roland, 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 “Gorilla Club” you won’t advance in this company. The Gorilla Club refers to that fact that there is a group of employees that workout at Mr. Gorilla’s Gym with Mr./Ms. Cole and Mr./Ms. Norman.
8. On the day after Kelly was fired, Mr./Ms. Cole called me into his/her office. I asked him why Kelly was fired. Cole replied “that all of us were getting old, that Kelly 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/her hit list.
9. Four days later Cole called me into his/her office. I thought for certain I was going to be fired too. Cole complained that Anne Mabie had reported that I was telling people that Kelly had been fired because s/he was too old. I told Cole that based on our previous conversation, it appeared to me that is what s/he said. Cole said that I misunderstood him/her and that the reason Kelly was allowed to resign was because of the recent changes in the structure of the divisions. Cole then said that if I continued to spread these rumors that s/he would fire me on the spot and that I could join the unemployment line like Kelly.

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 Knox Roland, the Human Relations Manager, to discuss my performance evaluation. S/he informed me that she had been specifically instructed by Cole to give me that evaluation. Roland also stated that s/he asked her when was I born. I am sure Cole 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.

\_\_\_\_\_

Chris Thompson

SUBSCRIBED AND SWORN TO BEFORE ME on the \_\_\_\_\_ day of \_\_\_\_\_, 2010, to certify which witness my hand and seal of office.

\_\_\_\_\_

Signature Notary Public

NOTARY INSIGNIA:

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CONTINENTAL  
MANSAIL DIVISION

KELLY GUNNAR §  
*PLAINTIFF* §  
VS. § CIVIL ACTION 867-CV-5309-D  
§  
CONTINENTAL CATERING §  
CONSOLIDATED COMPANY, §  
*DEFENDANT* §

**AFFIDAVIT OF KELLY GUNNAR**

STATE OF CONTINENTAL §  
§  
COUNTY OF STERRETT §

BEFORE ME the undersigned authority personally appeared Kelly Gunnar, known to me to be the person whose name is subscribed hereto and upon his oath deposed and stated as follows:

1. My name is Kelly Gunnar. 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 1988 until I was terminated on August 9, 2010. “4Cs” is what we called the company. 4Cs is principally engaged in the business of operating cafeterias and vending machines in industrial plants and office locations. 4Cs is owned by, and operated as a division of, Desperado Corporation.

3. I was 56 years old on the day I was terminated by 4Cs
4. Sandy Cole is the Vice-President of 4Cs and was my direct supervisor. Cole is also a Desperado Vice-President.
5. From the day I was hired in 1988 until the end of 2009, I was the General Manager of “4Cs North”, a region of 4Cs headquartered in Burlington, North Carolina.
6. Under my management, 4Cs North showed significant improvement in [its] financial performance in 2009. 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 4Cs.
7. During this time period, my job performance rating also increased significantly, from “competent minus” for 2008 to ‘commendable minus” for 2009. Cole was the person who evaluated me. My 2009 rating of “commendable minus,” was a significantly better rating. In fact, it is the second highest rating an employee can get at 4Cs.
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 Cole and Brady Norman, 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, 4Cs South, another region of the company, headquartered in Charlotte, North Carolina, did not perform so well.

Therefore, in December 2009 Cole came to me and discussed the possibility of taking over the South Region. Cole felt I could do for the South Region what I did for the North Region. I opted to accept Cole's offer of a transfer to 4Cs South as General Manager because I relished the challenge of turning that region around.

10. Even though I was transferred to 4Cs South, Cole remained my supervisor.
11. I started work in Charlotte in early 2010. Because the South Region was in such bad shape and had been so poorly managed, I told Cole that I expected it would take me about 18 months to make 4Cs South profitable. Cole stated that s/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, 2010 Cole began a two stage process that forced me out of my job. First, Cole assigned responsibility for a portion of my territory in 4Cs South to 4Cs 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 Cole did not identify the accounts to me. Every time I tried to talk with Cole about this s/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 4Cs 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 Cole' nephew. Cole never has said anything to me about this incident.
15. In any event, neither Cole nor anyone with the 4Cs made any claim that 4Cs South's financial condition was any worse than it had been when I arrived six (6) months earlier. In fact, Cole stated to me on more than one occasion that I "made progress with individual accounts and 4Cs South made improvements."
16. In mid-June, 2010, around the 14<sup>th</sup>, Cole 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, Cole said that "that's obvious, you're too dang old." S/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 2010, Cole came into my office and said to me, "Gunnar, you are too dang old for this kind of work and I think you should consider retiring."

18. In response to Cole, I said to the Human Relations Manager, Knox Roland, who was seated in another office nearby but within earshot, "Knox, did you hear that?" I could see the shock on her/his face at hearing what Cole had just said to me.
19. Then, in late July 2010, I heard that Brady Norman, the President of Desperado Corporation, instructed Cole to consolidate all Desperado and 4Cs operations in North and South Carolina into a single region to be run by Cole, and to combine the management responsibilities previously handled by Desperado's South Carolina Regional Vice President Anne Mabie, by Taylor Adams in 4Cs North, by me in 4Cs South, and by Melinda Henderson in Desperado's Raleigh-Greensboro operation.
20. On August 7, 2010, two days before I was discharged, Cole, another employee, Melinda Henderson, Chris Thompson, and I were in a company car on company business. Melinda Henderson said he was about to turn 57 and Cole made some comment about "isn't getting old a pain...I am sure glad I am not as old as you guys". S/he also made some reference to the fact that we should be in as good physical condition as s/he was and work out at the gym.
21. On August 9, 2010, I was terminated. At the same time, Melinda Henderson in Desperado's Raleigh-Greensboro operation, age 56, was demoted to commission salesperson. 4Cs South and Desperado's South Carolina operation were combined under Anne Mabie, age 40, and Desperado's Greensboro-Raleigh operation and 4Cs North were combined under Taylor Adams, 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.

\_\_\_\_\_  
Kelly Gunnar

SUBSCRIBED AND SWORN TO BEFORE ME on the \_\_\_\_\_ day of \_\_\_\_\_, 2010, to certify which witness my hand and seal of office.

\_\_\_\_\_  
Signature Notary Public

NOTARY INSIGNIA:

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CONTINENTAL  
MAINSAIL DIVISION

KELLY GUNNAR §  
*PLAINTIFF* §  
VS. § CIVIL ACTION 867-CV-5309-D  
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CONTINENTAL CATERING §  
CONSOLIDATED COMPANY §  
*DEFENDANT* §

**AFFIDAVIT OF BRADY NORMAN**

STATE OF CONTINENTAL §  
§  
COUNTY OF STERRETT §

BEFORE ME the undersigned authority personally appeared Brady Norman, known to me to be the person whose name is subscribed hereto and upon his oath deposed and stated as follows:

1. My name is Brady Norman. 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 (4Cs). I was the President of 4Cs and Desperado Corporation and I am currently the President of 4Cs and Desperado Corporation. I have personal knowledge of all facts stated herein, and such facts are true and correct.
2. 4Cs is a vending and food services company, which, although separately incorporated, is wholly owned by, and functioned as an operating division of, Desperado Corporation. Continental Catering Consolidated Company is a

wholly-owned subsidiary of Desperado 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 every day at the gym during lunch with some fellow coworkers, Sandy Cole, Taylor Adams, and Anne Mabie.
4. In mid to late July 2010, I instructed Sandy Cole to consolidate all Desperado and 4Cs operations in North and South Carolina into a single region run by Cole, and to combine the management responsibilities previously handled by Desperado's South Carolina Regional Vice President Anne Mabie, by Taylor Adams in 4Cs North, by Gunnar in 4Cs South, and by Melinda Henderson in Desperado's Raleigh-Greensboro operation.
5. I further informed Sandy Cole that the North Carolina region would be consolidated with Desperado's South Carolina region, which was then managed by Anne Mabie, 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 Sandy Cole to manage the consolidated "Carolinas Region" and instructed him to restructure the management responsibilities previously handled by Mabie 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 Mabie, Adams, Henderson, and Gunnar.

9. It was just a “coincidence” that led to Gunnar’s leaving the company after the consolidation process. This company has no animus against older employees. We abide by the law and do not discriminate against any individual 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. Gunnar made progress with individual accounts and 4Cs South made some improvement during his tenure. However, Gunnar was not selected for either new District position. These new Districts were significantly larger in numbers of accounts and employees and Gunnar’s territories had just recently been reduced because of our concerns over his/her performance. As a result of the elimination of Gunnar’s job in this consolidation, Gunnar’s employment ended.
11. 4Cs South and Desperado’s South Carolina operation were combined under Anne Mabie and Desperado’s Greensboro-Raleigh operation and 4Cs North were combined under Taylor Adams. The change was made because of Gunnar’s slow responses in reacting to individual problem accounts and my recent discovery that Gunnar had not responded in a timely way to a problem involving food delivery in unrefrigerated trucks. Moreover, Gunnar’s region was losing money and was therefore not profitable for the company. Furthermore, it is my understanding that Cole had reduced Gunnar’s territory on July 10 because of slow response to problem accounts and the unrefrigerated truck problem. Consequently, Gunnar was not a contender for the August job.

12. We did not select Gunnar 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 Gunnar was slow in responding to problem accounts.
13. Neither Mabie nor Adams had such performance problems.
14. A critical factor in not selecting Gunnar was the fact that even before the second reorganization, Cole had reduced the size of Gunnar's territory from six territories to three. Given that Gunnar was slow with his/her already reduced territory, we concluded that s/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 Gunnar's age played no part in his/her separation of employment from 4Cs. We had to make a legitimate business decision for the benefit of the company and unfortunately it was not to his/her advantage. Although Henderson's management position also was eliminated, she was not terminated or demoted; rather, she 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 Desperado. I have denied these charges and we are fighting this allegation in court.

\_\_\_\_\_

Brady Norman, President

SUBSCRIBED AND SWORN TO BEFORE ME on the \_\_\_\_\_ day of \_\_\_\_\_, 2010, to certify which witness my hand and seal of office.

\_\_\_\_\_

Signature Notary Public

NOTARY INSIGNIA:

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
MANSAIL DIVISION

KELLY GUNNAR	§	
<i>PLAINTIFF</i>	§	
VS.	§	CIVIL ACTION 867-CV-5309-D
	§	
CONTINENTAL CATERING	§	
CONSOLIDATED COMPANY	§	
<i>DEFENDANT</i>	§	

**AFFIDAVIT OF SANDY COLE**

STATE OF CALIFORNIA	§	
	§	
COUNTY OF STERRETT	§	

BEFORE ME the undersigned authority personally appeared Sandy Cole, known to me to be the person whose name is subscribed hereto and upon his/her oath deposed and stated as follows:

1. My name is Sandy Cole. 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 (4Cs). I was the Vice-President of 4Cs and I am currently the Vice-President of 4Cs. I have personal knowledge of all facts stated herein, and such facts are true and correct. I am also an officer of Desperado Corporation.
2. 4Cs is a vending and food services company, which, although separately incorporated, is wholly owned by, and functioned as an operating division of,

Desperado Corporation.

3. I am 39 years old and one of the youngest officers of 4Cs. 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. Kelly Gunnar began working for 4Cs in 1988. In 2010, just prior to his leaving the company, Gunnar held the position of General/District Manager for 4Cs South District and reported directly to me, the Regional Vice President in charge of 4Cs North Carolina operations. I also supervised a Desperado district covering Raleigh and Greensboro, North Carolina, managed by Melinda Henderson, and Continental's North District, managed by Taylor Adams, which included a number of territories in North Carolina and one territory in South Boston, Virginia.
5. Gunnar was originally assigned as manager of 4Cs North. Under his/her management 4Cs North showed "significant improvement in [its] financial performance" in 2009. Consequently, Gunnar's job performance rating also increased significantly, from "competent minus" for 2008 to "commendable minus" for 2009.
6. In 2009, I personally awarded Gunnar 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 is not performing as expected, which sometimes includes termination of employment.

7. During this same time period 4Cs South, another of our regions, headquartered in Charlotte, North Carolina, did not perform so well in 2009. Our projected goals for 4Cs South were not achieved. Gunnar came to me and specifically requested that I transfer him to 4Cs South as the new general manager. Gunnar stated that he could turn that region around in no time. All it needed, s/he said, was a good General Manager at the helm and s/he was the person to do it.
8. Though I praised him/her for his efforts in 4Cs North, I told Gunnar that 4Cs South was a completely different region and that s/he could not rely on his/her laurels for the success in 4Cs North in this region. I do not recall Gunnar telling me that s/he expected it would take him about 18 months to make 4Cs South profitable. I do remember a discussion regarding the need to have 4Cs South as profitable as soon as possible because it was losing too much money for the company.
9. In December 2009, I transferred Gunnar to 4Cs South as General Manager. At all times, even after the transfer, I remained Gunnar's supervisor.
10. Gunnar's last performance review, covering 2009, was "commendable minus."
11. In early July 2010, I reduced Gunnar's territories by reassigning one-half of his/her territories to Adams. I did this because of Gunnar's slow response to problem accounts.
12. I discovered that Gunnar had failed to respond timely to a problem involving the delivery of food in unrefrigerated trucks. I was also informed that several of his/her accounts were complaining about Gunnar's lack of attentiveness to their needs.

13. After I reduced Gunnar's territories, Brady Norman, President of Desperado informed that the North Carolina region would be consolidated with Desperado's South Carolina region, which was then managed by Anne Mabie, a Regional Vice President.
14. Norman selected me to manage the consolidated "Carolinas Region" and instructed me to restructure the management responsibilities previously handled by Anne Mabie 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 Mabie's South Carolina region, Gunnar's remaining territories, and the three (3) territories previously reassigned from Gunnar to Adams; and a "North District", which consolidated Adams's and Henderson's previous territories.
15. I selected Anne Mabie to supervise the South District and Adams to supervise the North District.
16. Mabie had been a Regional Vice President and his qualifications to supervise a large territory were well known to Norman and me. I had directly supervised him for many years before Mabie's promotion to Vice President.
17. Adams also had shown that he was a capable performer. In fact, he was assigned responsibility for half of Gunnar's territories concurrently with Gunnar's July 2010 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 Anne Mabie and Adams because I was Mabie's former direct superior, had firsthand knowledge of both of their work and abilities, and considered them competent to handle the greater responsibilities and larger geographic territory.
19. I did not select Gunnar for either new District position. These Districts were significantly larger in size, numbers of accounts and employees and Gunnar's territories had just recently been reduced because of my concerns over his/her performance. As a result of the elimination of Gunnar's job in this consolidation, Gunnar's employment ended. Although Henderson's management position also was eliminated, she was not terminated or demoted; rather, she was assigned to a sales position.
20. Furthermore, I did not know of this reorganization when I reduced Gunnar's territory on July 10. My conversation with him/her could have occurred immediately after Norman told me to reorganize: the directive from Norman could have occurred in late July. However, I have no documents fixing the date of the instructions to consolidate.

21. On August 9, Gunnar was relieved of his/her duties at 4Cs and Melinda Henderson, age 57, was reassigned to commission salesman. My reasons for reducing Gunnar's territory was his/her performance as compared to Mabie's performance.
22. I can assure you that Gunnar's discharge was based on reasonable factors and that his/her 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." Gunnar's performance problems had led to a significant reduction of his territories prior to my learning that Norman had decided to consolidate the North and South Carolina regions.
23. I cannot remember any conversation with Chris Thompson the day after Gunnar's discharge. Considering s/he is Gunnar's brother/sister-in-law, it does not surprise me that s/he would spread rumors about the reason for Gunnar leaving the company.
24. As far as the alleged comments I made to Gunnar, I cannot remember ever saying anything about his age. If any comments were made, they were made in a joking manner, between friends. Gunnar is trying to take friendly joking between colleagues and turn it into a case for illegal discrimination. The simple fact is that Gunnar had performance problems; did not make the South Region profitable and was not qualified for the new position. The only person s/he should blame for his termination is himself; not me or the company.
25. In December 2010, 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.

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Sandy Cole,  
Vice President

SUBSCRIBED AND SWORN TO BEFORE ME on the \_\_\_\_\_ day of \_\_\_\_\_, 2010, to certify which witness my hand and seal of office.

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Signature Notary Public

NOTARY INSIGNIA:

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CONTINENTAL  
MAINSAIL DIVISION

KELLY GUNNAR §  
*PLAINTIFF* §  
VS. § CIVIL ACTION 867-CV-5309-D  
§  
CONTINENTAL CATERING §  
CONSOLIDATED COMPANY §  
*DEFENDANT* §

**AFFIDAVIT OF TAYLOR ADAMS**

STATE OF CONTINENTAL §  
§  
COUNTY OF STERRETT §

BEFORE ME the undersigned authority personally appeared Taylor Adams, known to me to be the person whose name is subscribed hereto and upon his oath deposed and stated as follows:

1. My name is Taylor Adams. 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 (4Cs). I am the North District General Manager of 4Cs. I have personal knowledge of all facts stated herein, and such facts are true and correct.
2. I had worked for 4Cs for three (3) years before being assigned to 4Cs North.
3. I am 35 years old. I am an avid athlete and work out every day at the gym with others from the 4Cs.

4. In mid to late July 2010, I was called into a meeting with Cole and Mr. Brady Norman. I was informed that Cole was going to consolidate all Desperado and 4Cs operations in North and South Carolina into a single region to be run by Cole. The company was also going to combine the management responsibilities previously handled by me in 4Cs North, Desperado's South Carolina Regional Vice President Anne Mabie, by Gunnar in 4Cs South, and by Melinda Henderson in Desperado's Raleigh-Greensboro operation. I was told that the decision was made for financial reasons.
5. I was further informed by Cole that the North Carolina region would be consolidated with Desperado's South Carolina region, which was then managed by Anne Mabie, a Regional Vice President.
6. At this time, which was about a month prior to Gunnar's leaving the company, Cole discussed with me the possibility of taking on more territories. Cole said that he and Norman had determined that I was better able to handle a larger number of territories than Gunnar. About a month later, Cole transferred three of Gunnar's territories to me.
7. The territories I received from Gunnar were not doing well financially. However, with a few months, I was able to make them profitable.
8. I was not surprised to learn that Gunnar was losing some of his territories. I knew that Gunnar had done a good job while managing the 4Cs North Region, but cannot say the same for his management of 4Cs South. I also

know that Gunnar also had problems with some of his accounts. I got several calls from irate clients regarding Gunnar'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. Gunnar also complained a lot about how s/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, Gunnar 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 Gunnar was slowing down and thinking about retiring soon.
10. I have never heard any sort of rumors about 4Cs ever treating any of its employees differently because of their age. I did, however, hear that Chris Thompson, Kelly's brother/sister-in-law was spreading a rumor that the reason Kelly was fired was because of his/her age.
11. I have also heard rumors that Knox Roland was fired because of her/his age. Knox was fired because s/he stole money from 4Cs. I know this because I am the person that caught her/him endorsing company checks to herself/him and reported her/him to Norman. After discussing this matter with both Norman and Cole, I was instructed to fire her/him, which I did. Out of respect for Roland, we never told her/him that the reason s/he was being fired was because s/he had stolen money from the company. Because of her/his age the company decided it would be better to just let him/her go and not file any charges against her. We did not want to publicly announce that he/she was a thief.

12. I often saw Gunnar and Roland having lunch together and I was aware that they were very close friends having known each other since they were children. In fact, Roland and myself are the godparents of one of Gunnar'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 Gunnar.
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.

\_\_\_\_\_

Taylor Adams

SUBSCRIBED AND SWORN TO BEFORE ME on the \_\_\_\_\_ day of \_\_\_\_\_, 2010, to certify which witness my hand and seal of office.

\_\_\_\_\_

Signature Notary Public

NOTARY INSIGNIA:

# **4Cs / CC**

## ***MEMORANDUM***

**TO: ALL EMPLOYEES**

**FROM: SANDY COLE**

**RE: GEOGRAPHIC TERRITORIES**

**DATE: JULY 10, 2010**

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Please be aware of the following territory assignments:

**Adams**  
**4Cs North Manager**

Burlington  
Smithfield  
Tarboro  
Hickory  
Asheville  
Albemarle  
South Boston

**Henderson**  
**Desperado Manager**

Raleigh  
Greensboro  
Shelby

**Gunnar**  
**4Cs South Manager**

Charlotte  
Laurinburg

# 4Cs

## *MEMORANDUM*

**TO: ALL EMPLOYEES**

**FROM: SANDY COLE**

**RE: JANUARY 2010 GEOGRAPHIC TERRITORIES**

**DATE: JANUARY 3, 2010**

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Please be aware of the following territory assignments:

**Adams**  
**4Cs North Manager**

Burlington  
South Boston  
Tarboro  
Albemarle

**Henderson**  
**Desperado Manager**

Raleigh  
Greensboro  
Shelby

**Gunnar**  
**4Cs South Manager**

Charlotte  
Laurinburg  
Hickory  
Asheville  
Smithfield

**4Cs / CC**  
**MEMORANDUM**

**TO: ALL EMPLOYEES**

**FROM: SANDY COLE**

**RE: GEOGRAPHIC TERRITORIES**

**DATE: AUGUST 1, 2010**

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

**Mabie**

Southern District  
Charlotte  
Shelby  
Laurinburg  
Greenville  
Spartanburg  
Columbia  
Hickory  
Asheville  
Albemarle

**Adams**

Northern District  
Burlington  
Smithfield  
Tarboro  
Raleigh  
Greensboro  
South Boston

## STATEMENT OF THE CASE

Plaintiff, Kelly Gunnar, sued his former employer, Continental Catering Consolidated Company (4Cs), alleging that as a result of its August 2010 reorganization, 4Cs 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”).

## THE LAW

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 discrimination. Accordingly, the United States Supreme Court has created a *prima facie* case which creates 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 requires the employer to articulate 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 50 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 (7<sup>th</sup> 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:

- 1) that he belongs to a racial minority;
- 2) that he applied for and was qualified for a job for which the employer was seeking applications;
- 3) that, despite his qualifications, he was rejected; and
- 4) 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 must 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; and**
- 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 (6<sup>th</sup> Cir.1989) (quoting *Chappell v. GTE Prods. Corp.*, 803 F2d 261, 268 (6<sup>th</sup> 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 (7<sup>th</sup> 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 (10<sup>th</sup> Cir.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 (9<sup>th</sup> Cir.1990)(holding that certain statements unconnected to the employment decision-making process are simply stray remarks that do not demonstrate discriminatory intent).

## BURDEN OF PROOF

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*<sup>1</sup> 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.

*Continental 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 (5<sup>th</sup> 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 by asserting that the employer made a poor, or even incorrect, business decision. See, e.g., *Sherrod v. Sears, Roebuck and Co.*, 785 F2d 1312 (5<sup>th</sup> 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

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<sup>1</sup> *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.

employer. *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993). 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.

## **PREPONDERANCE OF THE EVIDENCE**

1. The burden of proof in an employment discrimination case is a “**preponderance of the evidence**”<sup>1</sup>. This means that for a Plaintiff to win, the jury or the Judge must, after hearing all of the evidence believe that it is more likely than not that the Plaintiff was discriminated against.
2. This standard is not the same as the “beyond a reasonable doubt” standard used in criminal cases where the jury or Judge must be 100% certain of its decision. In employment cases, if the Judge or jury is 51% convinced that illegal discrimination has occurred, the Plaintiff has carried its burden and wins. If the Judge or jury is not 51% convinced, the Plaintiff has failed to carry its burden of proving illegal discrimination and the Defendant wins.

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<sup>1</sup> Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.