

# Septuagenarian's claim dismissed: Discharge was for inadequate work performance

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*Both Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act (ADEA) prohibit employers from retaliating against employees for engaging in protected activity, including opposing discrimination made unlawful by Title VII and the ADEA. Retaliation consists of discriminatory actions that affect the terms and conditions of employment, and any adverse employment actions must be "nontrivial." But when does an employer's adverse action against an employee meet that threshold? As is often the case, the answer depends heavily on the circumstances.*

### **Background**

Norma Coleman, a 76-year-old African-American woman, worked for The Crossing, a group of companies that provide hospice care and home nursing services in Phoenix. For approximately four years, she held the position of HR/payroll manager. Her first three performance evaluations reflected that she met or exceeded her supervisor's expectations for every category of her review.

Over time, Coleman began to believe that she was making less than her younger non-African-American colleagues. In early fall 2010, she asked her supervisor for higher pay. The supervisor denied her request, citing a company salary freeze. Hearing that other employees were receiving raises, Coleman again asked her supervisor for a raise, but was rebuffed a second time.

In mid-October 2010, shortly after she requested a raise, Coleman received a written warning for her work performance that identified four areas "requiring immediate improvement." In response to the warning, she filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) alleging race, gender, and age discrimination. The EEOC ultimately dismissed her charge because it was unable to conclude that The Crossing had violated the law in the way Coleman alleged.

### **Second charge of discrimination**

After Coleman filed the EEOC charge, The Crossing engaged in a variety of conduct that she interpreted as retaliatory, including:

1. Requiring her to meet with her supervisor, who expressed bewilderment at her filing of the charge;
2. Admonishing her for failing to timely update employee files;
3. Issuing her a written warning for missing a work-related telephone hearing;
4. Excluding her from meetings and exit interviews;
5. Excluding her from birthday celebrations, and her supervisor "virtually refus[ing] to speak with her";
6. Issuing her a performance evaluation with a "needs improvement" rating in nine areas; and
7. Discharging her.

That conduct resulted in Coleman filing a second charge of discrimination, in which she alleged the company retaliated against her in response to her first charge. The EEOC concluded that there was reasonable cause to believe The Crossing had retaliated against her.

Coleman sued The Crossing, alleging retaliation. To succeed on her claim, she had to establish that she engaged in protected activity (which she did when she filed the first charge), she was subjected to adverse employment action, and there was a causal link between the protected activity and the adverse action.

The Crossing asked the court to issue judgment in its favor, arguing that much of the "retaliatory" conduct Coleman complained of was trivial and couldn't amount to adverse employment action, nor could she demonstrate a link between the company's conduct and her first EEOC charge.

### **Trivial conduct or adverse actions?**

Title VII and the ADEA prohibit any employment actions that tend to chill, or dissuade, a reasonable worker from making or supporting a charge of discrimination. Discharge, a negative employment reference, or an undeserved performance review

may qualify as adverse employment actions. Depending on the impact, changing job duties and lateral transfers may also suffice. Mere ostracism by coworkers is insufficient, however.

The court noted that "there is no question" that Coleman's discharge was an adverse employment action. Her subsequent written warnings and poor performance evaluations were also adverse actions sufficient to support her claim. However, the other actions she complained of didn't rise to the status of adverse employment actions. Refusing to greet her or invite her to birthday celebrations amounted to "mere ostracism," not retaliation.

With regard to her allegations that she was excluded from meetings and exit interviews, Coleman provided evidence of being excluded from only one meeting, and she admitted to attending at least some meetings after her first EEOC charge. Because attendance at meetings is for the employer's needs, not the employee's benefit, the court found this allegation to be too trivial to support her claim.

Finally, the court addressed Coleman's allegation that her supervisor confronted her about her first EEOC charge. The court noted that her supervisor said, "You should've come to me first," implying that she would've made an effort to resolve the matter. Because the standard is whether a "reasonable employee would have been deterred" from engaging in protected activity, the court found that the incident didn't amount to actionable retaliation.

### ***Claim dismissed***

The Crossing argued that Coleman couldn't demonstrate a causal link between her first EEOC charge and her discharge because the eight-month gap between the two "belies any inference of unlawful retaliation." The Crossing also asserted that the discharge was an extension of its warning regarding her performance before she filed the first charge. The court noted that Coleman couldn't demonstrate a causal link based on the time gap between her EEOC charge and her discharge, making clear that her performance issues were relevant to whether The Crossing had legitimate nondiscriminatory reasons for her termination, a factor unrelated to causal link.

With regard to the other incidents of retaliation, The Crossing offered a sensible reason for its conduct: Coleman wasn't able to meet the demands of her job. In making that assertion, the employer offered evidence of her failing performance prior to her first EEOC charge, including an internal audit revealing noncompliant records that forced it to scramble to bring the records into compliance before a government audit.

The company had also brought in an outside consultant to assess the state of its HR department. The consultant identified at least 12 significant deficiencies in Coleman's performance that could expose The Crossing to liability and recommended that the company outsource the HR function.

Coleman's lengthy history of performance deficiencies and The Crossing's decision to outsource its HR work resulted in her discharge. Because she wasn't able to demonstrate that her former employer's reasons were a pretext, or excuse, for retaliation, the court dismissed Coleman's case.

### ***Why are we telling you this?***

There are two important takeaways from this case:

1. Take care in how you respond to an internal complaint or formal administrative charge.
2. Make sure you train management and staff on the nuances of retaliatory conduct.

In this case, the EEOC dismissed Coleman's first charge without finding evidence of any underlying discrimination. It wasn't until its investigation into the second charge that the EEOC determined her rights could have been violated. Be cautious about all of your postcharge conduct, and reflect on whether any of your actions could be viewed as retaliatory. Be prepared to support your decisions with legitimate business reasons.

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