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## Idaho Supreme Court Rules Stray Remarks Insufficient to Establish Discrimination

*On January 22, 2009, the Idaho Supreme Court issued a unanimous decision in *Waterman v. Nationwide Mutual Insurance Company and Allied Insurance Company*. This decision lays out the test for a finding of age discrimination under the ADEA and is a favorable decision for employers.*

In this case, Joe Waterman brought suit against his former employer, Nationwide Mutual Insurance Company and Allied Insurance Company. The case went to trial on Waterman's claim that Nationwide/Allied's conduct violated the Age Discrimination in Employment Act of 1967 (ADEA). The jury returned a verdict in favor of Waterman, awarding him \$700,000 in damages. Following the trial, however, the district court granted Nationwide/Allied's motion to overturn the jury's verdict. Waterman appealed to the Idaho Supreme Court and asked it to reinstate the \$700,000 jury verdict.

The facts of the case are as follows. Waterman was hired by Nationwide in 1979 as an insurance claims adjustor and was the sole adjustor in the Boise area until 1993, handling all types of claims. When a second adjustor was hired in 1993, Waterman began handling property damage claims exclusively.

Nationwide bought Allied Group Inc. in October 1998, and the two companies began merging in 2000. As part of this integration process, all employees were required to complete a Technical Background Update listing their technical competency and prior work performance. In July 2000, Waterman completed the Technical Background Update. In it he listed 21.5 years experience in auto and property damage claims and 15 years experience in medical payments (med pay), bodily injury, litigation, general liability and personal injury protection.

From June 2000 to October 2000, Waterman received in-depth information about the merger from a weekly company publication. In October 2000, Waterman also learned he would have a job position, post-merger, as a multiline adjustor. Though not given a job description, Waterman testified that he knew the information was available online for review.

Prior to the merger, each company used its own computer software system to handle claims. The decision was made to convert all claims processing to the Allied model following the merger. In December 2000, Waterman was informed that he would be working from home, and he would be settling existing Nationwide claims on the Nationwide computer system while transitioning to the new Allied software. Waterman was required to set up two separate computers at his home office as the two software systems could not run on the same computer. Waterman was using a dial-up line for internet access, and therefore had to completely shut down one computer and start the other computer when he needed to switch systems.

Beginning in either January or February 2001, Waterman began processing Allied claims. He testified that the number of Allied claims, combined with his existing Nationwide claims, overwhelmed him and that he did not receive the help he requested from Nationwide/Allied. Nationwide/Allied introduced evidence that Waterman's work was below expectations, and he was given a verbal warning on February 4, 2001. In March 2001, Nationwide/Allied created an action plan to help Waterman improve his performance.

Waterman contended he was not receiving adequate training on the new Allied system. His supervisors, however, questioned him on May 2, 2001, regarding whether lack of training was causing his performance issues. He responded that a lack of training was not the problem, rather the workload was too heavy. On May 22, 2001, Waterman agreed to a work improvement plan, whereby he was required to become compliant with Nationwide/Allied's claims handling standard by 50% in the first month and 75% within three months. Interestingly, Waterman requested a severance package from Nationwide/Allied around this same time. However, as his position had not been eliminated, the request was denied.

Waterman went on vacation in June 2001, and after returning from vacation, took FMLA leave for depression on his doctor's advice that he not work for four to six months. In a letter dated September 5, 2001, the company notified Waterman that his FMLA leave was exhausted and they would be restaffing his position. As of the date his FMLA leave expired, Nationwide/Allied placed him on long-term disability and he received approximately 60% of his salary. On September 17, 2001, Waterman was told that his position still had not been filled and that he should try a gradual return to work. Waterman refused, stating he did not believe he could ever return to a full workload. The company subsequently filled his position on September 24, 2001.

A later independent medical examination found Waterman was not disabled and his benefits were discontinued. On April 27, 2002, the company reinstated Waterman's full salary for two months and advised him to find a new job within the company; however, there were no available positions in Boise and Waterman was unwilling to relocate.

Waterman filed his lawsuit against the company on January 24, 2004, asserting age discrimination. The company's defense was that it had acted based on legitimate, non-discriminatory reasons and without regard to plaintiff's age. The jury trial began on December 13, 2006.

At trial, Waterman introduced testimony from a claims director and a district claims manager concerning comments, made on two different occasions, in which Allied was referred to as a "young company." The claims director, however, testified that he was not sure what the comments actually meant. After a four-day trial, the jury returned a 9-3 verdict in favor of Waterman, awarding \$700,000 in damages. The trial judge later overturned the jury's verdict and entered judgment in favor of Nationwide/Allied, holding that Waterman failed to establish several essential elements of his case.

Waterman appealed the decision of the district court the Idaho Supreme Court. The court said that to establish an age discrimination claim, Waterman had to show: 1) he was at least 40 years old; 2) he was performing his job in a satisfactory manner; 3) he was discharged or his employer took adverse employment action against him; and 4) his position was filled by a younger person of equal or lesser qualifications.

The Idaho Supreme Court concluded that the district court did not err in overturning the jury verdict. The Court found that in order for Waterman to establish the third element of his claim, he had to prove

that he was discharged or that Nationwide/Allied took adverse employment action against him. Though Waterman claimed his position was so intolerable that he was “constructively discharged,” the Court found that there was no evidence that conditions became so intolerable that a reasonable person in his position would have felt compelled to resign. Nationwide/Allied actually attempted to work with Waterman so he could gradually return to his job, and offered to help him find another position within the company. Additionally, the Court found Waterman failed to establish that his age played any role in the company’s treatment of him because Waterman’s only evidence was the two stray comments regarding Nationwide/Allied as a “young company.” The Court held that stray comments are insufficient to establish a discriminatory intent, unless the employee can put the comments into context and produce evidence of intent behind the comments.

### **Points for Employers**

1. In this case, the employer ultimately prevailed because it—
  - carefully documented the employee’s performance problems;
  - made extra efforts to train the employee and coach him through his performance issues; and
  - was willing to re-employ him even after an extended leave.
2. Though the employer prevailed in the lawsuit, it is likely that no case ever would have been filed were it not for the “stray comments” about the employer being a “young company,” company personnel need to be trained and reminded of the inappropriateness of such seemingly innocent remarks.