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## Third Circ. Clarifies Comparator Evidence Following Age Bias Case

On April 12, the U.S. Court of Appeals for the Third Circuit affirmed a jury verdict awarding a 57-year-old former employee upwards of \$258,000 in an age discrimination suit against specialty health and wellness retailer, GNC.

By **Jeffrey Campolongo and Emily Wisniewski** | April 25, 2019

On April 12, the U.S. Court of Appeals for the Third Circuit affirmed a jury verdict awarding a 57-year-old former employee upwards of \$258,000 in an age discrimination suit against specialty health and wellness retailer, GNC.

Santos Andujar, after being fired from his position as a GNC store manager, sued the company in New Jersey state court alleging wrongful termination in violation of the New Jersey Law Against Discrimination (LAD). GNC then removed the case to federal court in the District of



**Jeffrey Campolongo, left, and Emily Wisniewski, right.**

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New Jersey where its subsequent motion for summary judgment was denied. The case was then tried before a jury. The jury found that GNC's claim that it terminated Andujar on the basis of poor performance was pretext for age discrimination. GNC challenged the verdict on appeal arguing that the "comparator" evidence offered by Andujar was insufficient to prove that GNC had discriminated against Andujar on the basis of his age. Writing for the court, Judge Thomas Hardiman rejected GNC's argument and emphasized that companies cannot hold older employees to more stringent standards of performance than it would its younger employees.

Santos Andujar began working for GNC in 1999. In 2001, Andujar was promoted and held the position of store manager until his termination in February 2014 at the age of 57. During his employment, Andujar was evaluated annually for his performance through the use of two assessments: the critical point audit (CPA) and the performance evaluation process (PEP). A passing CPA score is 90 percent and a passing PEP score is 300 out of a possible 500 points. From 2010 to 2013, Andujar's CPA score ranged from 68 to 88 percent. On Jan. 23, 2014, Andujar received a failing PEP score of 287. That same day, GNC placed Andujar on an "action plan" which required him to make performance improvements within 30 days. One month later, Andujar was fired for failing to comply with the action plan. GNC then replaced him with a man in his 20s.

Following his termination, Andujar sued GNC for age discrimination under the New Jersey LAD. Having been discharged at age 57 and replaced by a significantly younger employee, Andujar easily established a prima facie case of age discrimination. However, because his performance did not adhere to the requirements set forth by either the PEP or the CPA, GNC articulated a legitimate nondiscriminatory reason to fire him. Therefore, the trial turned on the question of whether Andujar could prove that GNC's stated reason for his termination was pretextual.

Because one of the ways pretext can be shown is through offering evidence that the complaining employee was treated differently than other similarly situated employees, Andujar presented the names and ages of six GNC store managers with a PEP score below 300 from 2012 to 2015. The six store managers listed were all younger than Andujar by at least 10 years and none of them were placed on an action plan or terminated within 30 days of receiving a failing PEP score.

On appeal, GNC argued that the employees listed by Andujar were not appropriate comparators because some of the managers had been working a short time, engaged in different misconduct, and none of them had failing CPA scores. The Third Circuit rejected GNC's argument and found that employees were sufficient comparators because all of the employees listed were managers in the same region as Andujar and all had failing PEP scores. Citing case law from the New Jersey Supreme Court, the Third Circuit noted that comparators need only be similarly situated in their qualifications and job category, not identical in all aspects.

Although the Third Circuit Court opinion is nonprecedential, it nonetheless falls in line with similar Third Circuit cases that consistently construe the term "similarly situated employee" with relative flexibility. For example, in *Monaco v. American General Assurance*, F.3d 296 (3d. Cir. 2004), the court likewise determined that an individual does not need to be situated identically to satisfy the fourth element of a plaintiff's prima facie case of discrimination under the New Jersey LAD. Rather, in order to determine who might qualify as a similarly situated employee the court must look to the job function, level of supervisory responsibility and salary, as well as other factors relevant to the particular workplace. This determination requires a court to undertake a fact-intensive inquiry on a case-by-case basis rather than in a mechanistic and inflexible manner. Aptly stated by Hardiman, the takeaway for employers following this case is simple: "Companies have the right to discharge their employees for poor performance, but they can't excuse the shortcomings of younger workers while bringing down the hammer on older workers."

**Jeffrey Campolongo** *is the founder of the Law Office of Jeffrey Campolongo, which, for over a decade, has been devoted to counseling employees, working professionals and small businesses in employment discrimination and human resource matters.*

**Emily Wisniewski** *is a rising law student at Villanova University's Charles Widger School of Law. She is the elected Student Bar Association representative for her class. Her interests include employment law, specifically workplace accommodations involving service animals.*