

## Flight Attendant's Claim That Probation Was Age Discrimination Simply Won't Fly

by Serena O'Neil - Thursday, July 11, 2019



A Federal Court in Minnesota recently **ruled** that simply being placed on probation is not an adverse employment action upon which an age discrimination claim can be based.

Diane Ford, a fifty-eight year old woman, has been a flight attendant for Delta Air Lines since 1987.

In August 2017, Delta put Ford on probation for eighteen months, citing “reliability issues” based on the following alleged behaviors on her part:

- Giving a union card to a sick workmate during a flight;
- Allowing economy passengers to use the bathrooms designated only for first-class passengers; and
- Taking improper sick leave and checking in late for a flight.

Ford claimed that she became “terrified” about going in to work because she felt that Delta was looking for reasons to fire her. As a result, she claimed she missed some workdays and lost wages.

### Employee Airs Grievances

Ford contested her probation internally on the basis of age discrimination. She claimed in her lawsuit that while Delta ultimately decided to “drop the charges” against her, she remained on probation. Ford continued to press her complaints about age discrimination and asked that the

incidents leading to her probation be permanently removed from her personnel file. Delta denied this request.

Ford encountered no further problems on the job until August 2018, when her manager allegedly scolded her regarding the length of her hair. Although she received no formal disciplinary action, Ford believed this to be more evidence of age discrimination since a younger flight attendant with even longer hair was not similarly reprimanded.

Ford filed an age discrimination charge with the Equal Employment Opportunity Commission (“EEOC”) and then sued Delta in federal court for age discrimination under federal and state law. Delta immediately filed a motion to dismiss.

## **Age Discrimination Claims Fail to Take Wing**

Minnesota District Court Judge David Doty granted Delta’s motion to dismiss the case for the simple reason that Ford failed to identify sufficiently adverse action that would give rise to a recognizable claim of discrimination. Judge Doty explained that a discrimination claimant must be able to show some sort of adverse action, e.g. termination, a cut in pay or benefits, or some other action that produces a “material employment disadvantage.” Citing previous decisions of the 8th Circuit Court of Appeals in which Minnesota sits, Judge Doty ruled that simply being placed on probation with no actual impact to the tangible aspects of employment does not meet this standard.

The judge then noted that in this instance, Ford suffered no change in pay, benefits, schedule or responsibilities as a result of being placed on probation. Ford disagreed, arguing that she did in fact lose work time and corresponding wages because she was afraid of receiving more complaints if she came to work. Judge Doty was unpersuaded, explaining that the decision to miss work and forfeit wages was Ford’s alone, and that an employee “cannot manufacture an adverse employment action by simply not going to work.”

Ford also argued that in other cases, Delta employees on probation did not receive benefits or consideration for promotion. The judge observed, however that Ford had not actually presented any evidence that she herself suffered these losses during her probation, and that “bald factual statements” to the court are not palpable evidence of discrimination.

Finally, Ford tried to contend that she encountered a hostile work environment based on age. This claim also failed to get off the ground as Judge Doty found no evidence of an objectively hostile work environment or of any age-based behavior that might have contributed to an intolerable work setting.

## **Bottom Line**

It appears that in the 8<sup>th</sup> Circuit, simply being placed on probation without any corresponding disciplinary action or diminution in pay or position will not be sufficient to allow an age

discrimination case (and presumably other types of discrimination claims) to move forward. That is good to know.

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