

Employee's Refusal to Take Drug Test Could Not Support Age and Gender Discrimination Claims

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A federal court in Massachusetts dismissed the age and gender discrimination claims of a long-term employee who was fired after he refused to take a “reasonable suspicion” drug test. *Tombeno v. FedEx Corporate Services, Inc.*, CV. No. 16-cv-40008-TSH (D. Mass. Jan. 9, 2018).

Tombeno worked for FedEx for 22 years as a Business Development Sales Executive. When hired, he signed an agreement permitting the Company to conduct drug and alcohol testing. Tombeno and his supervisor sometimes drove together for business purposes. On one occasion his supervisor approached Tombeno's car and smelled marijuana. The supervisor sought guidance from Human Resources and a few days later Tombeno was advised to report for drug testing. He was told that if he refused he could be terminated. Tombeno subsequently admitted that he was aware of that fact. Despite knowing he could be terminated, Tombeno refused the drug test. His employment was terminated. He was 63 years old at that time.

Tombeno asserted that he was discriminated against due to his age because his replacement was younger and did not perform as well as he did. But the court held that there was no nexus between this assertion and the reason for his termination.

Tombeno also asserted that he was discriminated against due to his gender because his supervisor (a woman) terminated two other men. However, they were terminated for different reasons than Tombeno, and, he could not show any similarly-situated

women who had been treated better.

Tombeno's other claims also were dismissed.

Employers should ensure that their drug and alcohol policies contain language making it clear that refusals to submit to drug and alcohol testing will lead to termination.

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