

# You Make the Call: Firing an Employee for Poor Performance AND Being Too Old



## SITUATION

You need to downsize and now face the unenviable task of deciding who gets the axe. The choice comes down to two candidates currently doing the same job: Tom Young and Bill Elder. Both are hard-working and well-liked. Both have been with the organization for 10 years. But you choose Bill because:

- He makes more money;
- His performance has declined noticeably in recent years; and
- He's 59, 25 years older than Tom.

## QUESTION

Did you commit age discrimination?

## ANSWER

You sure did commit age discrimination.

## EXPLANATION

There are 2 clear things most HR managers know about age discrimination law:

1. It's illegal to fire employees because of their age; and
2. It's not illegal to fire an older employee for poor performance and other legitimate, non-discriminatory reasons.

But decisions to terminate older employees may not be either-or. In many cases, the employee is terminated for both age AND performance (or other legitimate, non-discriminatory reasons.)

## RULE

**Termination is discrimination if age is even one of the motives even if performance and other legitimate issues factored into the decision.**

## PRACTICAL IMPACT

Choosing Bill for downsizing would have been okay if you had based the decision solely on his declining performance and higher salary. But the moment you brought age into the equation, you tainted the entire decision with the brush of discrimination.

### **TAKEAWAY**

Keep in mind that these same principles apply to not only age but race, religion, sex, disability and all other forms of discrimination banned by human rights laws.

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