

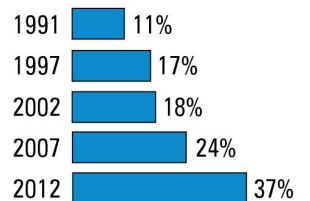
# Older employee slowing down: Does termination = discrimination?

When some older workers hear the word “slow,” they may immediately assume that’s a code word for “old.” But sometimes, slow just means slow.

As a new court ruling shows, if you have employees who can’t meet the job’s required—and preferably written—performance levels, you’re not required to keep them on staff, regardless of their ages. If you do plan to discipline or terminate an older worker due to the person's reduced or poor performance, just make sure you follow the golden rule of employment law ... Do It To One, Do It To All. Equality and consistency will save you in court.

Also, remember that aging, by itself, is not considered a disability under the ADA (*see box below*). However, older employees may have medical conditions related to age that do rise to the level of a disability and, thus, must be accommodated by the employer.

## Percentage of U.S. workers who expect to retire after age 65



Source: EBRI Retirement Confidence Survey

**Consider this recent case:** Cheryl, a cellular service sales representative, shared a workspace with a number of younger sales reps. Almost from day one, supervisors counseled Cheryl on her attendance and tardiness, noting that she was frequently late for her shift.

Although Cheryl did receive one positive year-end review, her performance slowly deteriorated. Her supervisors constantly complained that she took far too long to complete transactions and often took much longer than her colleagues to close out at the end of the day.

Finally, when nothing improved, Cheryl was terminated.

She sued, alleging age discrimination and claiming that the “too slow” argument was just code for saying she was too old to work in cellular sales. Plus, she said older customers sought her out because of her maturity and those customers took longer to choose services.

The court didn’t buy her arguments, and sided with the company, noting it had given Cheryl plenty of opportunities to improve her speed and correct her tardiness. ([\*Austin v. Alltel Communications\*](#), MD NC, 2013)

**Final note:** Had supervisors made other comments to accompany their complaint of slow performance, the

case might have turned out differently. But no one called Cheryl “old” or made other negative comments. The supervisors focused on her actual performance, measuring it against all co-workers, both young and old. They used objective measures, such as time spent to finish setting up accounts for customers.

## **Aging and the ADA**

According to the Job Accommodation Network: “Aging, by itself, is not an impairment, but a person who has a medical condition (such as hearing loss, osteoporosis, or arthritis) often associated with age has an impairment on the basis of the medical condition. A person does not have an impairment, however, simply because he or she is advanced in years.

“The ADA does not contain a list of medical conditions that constitute disabilities. Instead, the ADA has a general definition of disability that each person must meet. Therefore, some people with age-related impairments will have a disability under the ADA and some will not.

“A person has a disability if he or she has a physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment, or is regarded as having an impairment. (EEOC Regulations, 2011)

For more tips on accommodating aging employees, check out the [\*\*Job Accommodation Network\*\*](#).