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### **Employer Seems Poised to Lose Demotion Over Failure to Document**

Sometimes you come across a case with multiple key lessons, and the Tenth Circuit Court of Appeal's recent oral argument session in the case of *Sharpe-Miller v. Walmart, Inc.*, has proved to be such a treasure trove. I previously discussed the Tenth Circuit's pointed questions and expressions of doubt to Walmart's counsel concerning the harassment claims against it [here](#).

But wait, there's more. The plaintiff in that case had also brought claims for discriminatory demotion, and the district court's dismissal of that claim was also up on appeal. And on that count, the Tenth Circuit (which hears appeals of federal district court decisions from Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming) had serious questions about whether Walmart had satisfied even its minimal burden to articulate a legitimate nondiscriminatory reason for the termination.

You see, Walmart didn't document the reason for plaintiff's demotion at the time. At summary judgment, the *only* evidence of Walmart's legitimate nondiscriminatory reason for plaintiff's demotion was the *plaintiff himself* testifying about what Walmart's managers told him at the time about his demotion: that it was for performance reasons.

One of the judges (I believe Chief Judge Jerome A. Holmes) grilled Walmart's counsel: "But more to the point, is there an affidavit or any[thing] from a Walmart employee saying, 'we demoted him for X reason'? .... I mean, who cares what Mr. Sharpe-Miller thought? ... *Walmart is the one who's got the burden to explain why they did what they did.*"

Judge Carolyn B. McHugh also seemed to find fault with Walmart's reliance on the plaintiff's own testimony as speculative, and commented: "There's no paperwork that says, 'this is why we [demoted] him.' "

### **Employer Takeaways**

1. Document,
2. Document,
3. Document.

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