

Do It Again – Implicit in every remand order is a command to get it right the next time. So you can't really blame Judge **Stephen Smith** for wanting to allow "a full exploration of the pertinent issues" in a retrial on punitive damages in an age discrimination suit.

But the Morris County judge took it a step too far, with the result that the plaintiff — who'd won \$1.875 million in punitive damages in his first trial — got bubkis in the second.

Sidney Shemonsky, a program analyst at Witco Corp. in Woodcliff Lakes, was let go at age 60 in a departmental shake-up that he called a pretext for targeting older employees. A jury agreed, awarding him \$2.25 million. But the Appellate Division reversed the punitives and remanded for development of evidence that upper management was involved in or willfully indifferent to the age bias.

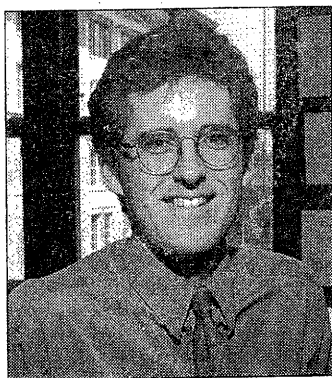


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ANDREW DWYER

At the retrial, over the objections of Shemonsky's lawyer, Smith allowed Witco to present evidence that the termination was based on poor performance evaluations and that it acted in good faith based on an attorney's advice. Shemonsky's appellate lawyer, **Andrew Dwyer** of Newark, argued that the ruling in essence allowed Witco to reopen the age-bias issue, while Shemonsky wasn't allowed to prove anything about the damages he suffered.

And since the jurors found that the discrimination was neither malicious nor egregious, they never reached the issue of whether upper management was involved or indifferent — which was the reason for the retrial in the first place.

You can guess the rest. Another remand, *Shemonsky v. Witco Corp.*, A-5251-98T5, came last Monday. The panel, calling Smith's jury charge too narrow, told him to get it right next time.

— *By Charles Toutant, Henry Gottlieb and Mary P. Gallagher*