

Age Discrimination Increases as Boomers Age

As Boomers, most of us do not consider ourselves “old”. While we probably realize we no longer are the physical specimen that graduated from high school or college, we still take pride in making that late teen, early 20 something “young” person tired when we tell them what we’ve accomplished on a Saturday before they even get out of bed. But we are at the age when age discrimination in the workplace becomes an issue.

The Age Discrimination in Employment Act (“ADEA”), originally enacted in 1967, is a federal statute prohibiting employment discrimination based on age for workers who are at least 40 years of age. The ADEA protects both employees and job applicants and applies to employers with 20 or more employees. It covers all practices related to employment including hiring, firing, promotion, layoff, compensation, benefits, job assignments and training.

The Pennsylvania Human Relations Act (“PHRA”), a state statute, also prohibits age discrimination in employment protecting workers age 40 and older and applies to employers with four or more employees.

Employees who successfully prove that an adverse employment action is based on age may obtain lost wages, fringe benefits, eligibility for reinstatement or front pay, and attorney fees. In the event of willful violations, a court may award liquidated damages under the ADEA by doubling the back pay award. The PHRA also allows an award of damages for emotional stress.

Charges alleging illegal discrimination must initially be filed with the Equal Employment Opportunity Commission (EEOC) or the Pennsylvania Human Relations Commission (PHRC). The filing deadlines are short – 180 days for the PHRC and 300 days for the EEOC after the alleged discrimination.

How is discrimination proved? There are several approaches. Sometimes employers expressly tie age to work eligibility or other job factors. An example of this was the New York City Transit Authority’s effort to require mandatory EKG tests for station supervisors 40 or over, or for station supervisors under 40 who had a history of heart disease. This type of requirement is discriminatory on its face and can only be sustained if the employer can show that age is a bona fide occupational qualification. This defense is very narrow, requiring the employer to prove either that a substantial basis exists for believing that all or nearly all employees, above a specified age, lack the qualification required for a particular job, or that reliance on an age classification is necessary because individual testing to ensure qualification is highly impractical. The New York City Transit Authority failed to meet this standard.

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Other types of cases involving discrimination include “direct evidence”, “mixed motive”, “pretext” and disparate treatment.

In a “direct evidence” case, a worker may be fired, for example, after being told that he is getting too old for the job, or that the company needs somebody younger. This kind of direct evidence is more common in age than in some other kinds of discrimination cases, perhaps because attitudinally, ageism is deeply rooted in our culture and is more freely displayed than other forms of prejudice such as racism.

Because most employers who discriminate are sophisticated enough to try to hide motives they know are illegal, most discrimination cases, including age discrimination cases involve circumstantial rather than direct proof of discrimination – a “mixed motive” case. In these instances, the individual alleging discrimination must make an initial showing, called a prima facie case, which creates a presumption of discrimination. This is usually done by showing that the employee is a member of the protected class (i.e. that he or she is 40 or older), that the employee is qualified for the position held or desired, and that there are other circumstances suggesting discriminatory cause such as replacement by a younger worker. Once the prima facie case is met, the burden shifts to the employer to explain its actions were based on a legitimate, non-discriminatory basis.

The burden then shifts to the employee who must show that the employer’s asserted non-discriminatory reason is really a “pretext” for an illegal motivation. Employees can show pretext in a variety of ways that largely reflect common sense about how people express or hide motives. For example, an employer may have changed its story about the reason, giving one explanation to the employee, a different one to unemployment compensation, a third reason to the EEOC and possibly another response at trial which suggests prejudice on the part of the employer or a biased corporate culture. There may be evidence that the employer has treated comparatively situated younger employees more favorably or that the employer has deviated from patterns established with older workers. This sort of evidence – that there was intent to discriminate against a protected class – is called disparate treatment. Statistical evidence may also justify an inference that discrimination is at work.

The Supreme Court’s decision in *Reeves v. Sanderson Plumbing Products* illustrates several of these approaches. This case included evidence that the business reason asserted by the employer for the discharge was false, comments by a company manager showed age bias and comparative evidence of more favorable treatment of a younger employee. In *Reeves*, the Supreme Court upheld a jury verdict for Mr. Reeves and reversed the Fifth Circuit Court of Appeals which had determined that Mr. Reeves had not offered sufficient evidence of discrimination to win. The Supreme Court said he had proved the prima facie case that the employer’s reasons were false.

In 2005, age discrimination cases took a new twist. The Supreme Court clarified in *Smith v. City of Jackson* that age discrimination cases could be brought based not only on disparate treatment, but based on disparate impact as well. Disparate impact recognizes that certain neutral policies and practices may not intend to discriminate, but the ramifications of those policies and practices disproportionately affect a protected group, such as older workers. Prior to *Smith*, the EEOC recognized disparate impact claims but our Court of Appeals, the Third Circuit Court of Appeals, did not.

In *Smith*, the City of Jackson, Mississippi adopted a pay plan aimed at making police officers' salaries more competitive. Under the plan, police officers with less than five years experience received a higher increase than those with more experience. The result was the older, more experienced police officers felt they were adversely affected because of their age. The Supreme Court ultimately found that the police employers had not identified any specific test, requirement or practice in the pay plan that had an adverse impact on older workers and that the decision to base raises on seniority was based on reasonable factors other than age. So although the older workers did not win their case, they did achieve an important victory in clarifying that disparate impact claims can constitute a legitimate age discrimination suit.

Knowing how discrimination can be proved is important for both employers and employees.

- Employers should of course avoid taking any personnel actions for illegal discriminatory reasons. They should judge employees fairly, on their merits, consistently, and honestly, and should not tolerate prejudice in the managers or supervisors.
- Employees should know what to look for if they suspect they are a victim and the necessary elements for proving discrimination.

The Labor and Employment attorneys at Rothman Gordon are available for advice, guidance and, if necessary, litigation in matters of age discrimination.

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