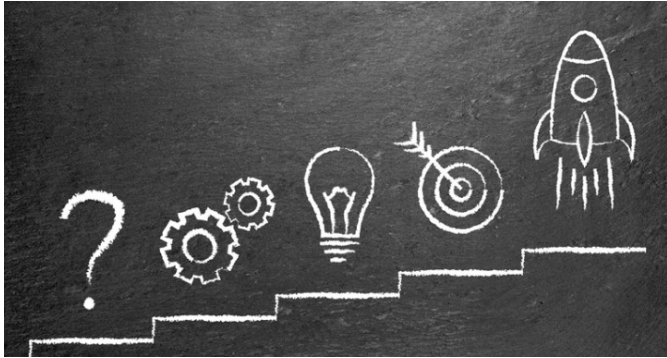


Age Discrimination Update - Part 1

May 4, 2012



Age: A Fact of Life

Consider the average time a job is held in the United States; one source tells us slightly less than five years. It would seem, therefore, that youth should actually play less of a role in the selection and retention of employees than in years gone by. Nevertheless, age does play a role, recognized by some as a serious impediment to the older worker and explained away by others as a "fact of life."

The latter was actually a quote from a federal Court of

Appeals opinion used in a 2009 New York Times editorial. The Court was reportedly assessing the evidentiary weight to be given to a statement by a company's vice president in an age discrimination case that "[t]here comes a time when we have to make way for younger people." The Court held that the statement was "irrelevant," as it was simply stating a "fact of life."

The editorial suggested that "age discrimination is not taken as seriously as other biases." Although race discrimination is viewed generally as inherently wrong, "there is something natural about the old making way for the young." The editorial nevertheless concluded:

To be rejected on account of old age may or may not feel the same as being rejected on the basis of race or sex. But it is clearly unjust and dehumanizing, and the law should take it more seriously than it does.

The law alluded to was the federal Age Discrimination in Employment Act ("ADEA"). Originally enacted by Congress in 1967, it has been amended a number of times through the years. Like Title VII of the Civil Rights Act of 1964 ("Title VII"), the ADEA was part of a wave of employment legislation in the 1960s, the goal of which was to level the playing field for certain classes of disadvantaged members of the labor force. In the case of the ADEA, employees over age 40 were afforded protection from discrimination in the workplace.

The statement of congressional intent contained in the ADEA is worth repeating:

[T]o promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment.

In enacting the ADEA, Congress took the issue of age discrimination quite seriously. It did not grant leeway to employers (or the courts, for that matter) to tell older workers to face up to reality; make way for fresh faces, so to speak; or "take it to the barn."

However, application of a law to the facts of life, real or presupposed, sometimes thwarts the law's good intentions. Forty-five years after enactment of the ADEA, one very real fact of life is prolonged hard times. A 2010 New York Times article, entitled "For the Unemployed Over 50, Fears of Never Working Again," quoted

statistics that older workers have been disproportionately unemployed not only since the economic collapse in 2008, but also for periods of six months or longer: a large-scale disparate impact. It may get worse before it gets better.

More recently, an article in the Wall Street Journal, "Oldest Baby Boomers Face Jobs Bust," cited U.S. Department of Labor ("DOL") statistics that four million Americans aged 55 to 64 are unable to find work, a number that has doubled over the course of five years. The article also cited DOL statistics showing that the average duration of unemployment for those aged 55 to 64 is 56.6 weeks, as compared to 35.9 weeks for 25- to 34-year-olds, and 47.8 weeks for 45- to 54-year-olds.

It is probably no coincidence then that the Equal Employment Opportunity Commission ("EEOC") reports a significant increase in age discrimination charges. In terms of gross numbers and percentage of all charges (made on the basis of age, sex, race, national origin, color, religion, and disability), the number of age discrimination charges increased from 16,548 (21.8% of all charges filed) in 2006 to 22,778 (24.4% of all charges filed) in 2009.

A tongue-in-cheek review in the Wall Street Journal, entitled "Revenge of the 60-Year-Old Has Beens," recently suggested that, "Once you're past 60, you should be thinking about making a graceful, dignified move towards the exit." No wonder those who have attained the sixth decade of life may face the competitive job market not only with fear and trembling, but also with exquisite sensitivity for their legal rights. Consequently, employers' time will also be well-spent considering in detail the ADEA and other laws that deal with duties to older workers.

Age Discrimination: A Primer

Age discrimination is illegal. That is true under the ADEA as well as state law, but not everyone of a certain age is entitled to legal protection. Individuals over the age of 40 are covered by the ADEA. Most employed and employable persons who are over 40 and who have suffered an adverse job action because of age may make a charge of discrimination under the ADEA against a covered employer. But not all. Independent contractors, partners in partnerships, and uniformed personnel in the active or reserve military are not protected by the ADEA.

ADEA protection is subject to limitations. Coverage under the ADEA is slightly more circumscribed than under Title VII, which is the federal law that protects against workplace discrimination on the basis of sex, race, national origin, color, and religion. Title VII applies to employers who have at least 15 employees, while the ADEA applies only to private employers who have 20 or more employees. Thus, the employees of small private businesses generally lack protection under either or both the ADEA and Title VII.

The ADEA does apply to labor organizations, employment agencies, and state and local governments. Coverage of state government employment gets more complicated, however, as the United States Supreme Court has held that, pursuant to the doctrine of sovereign immunity, state employees may not sue for monetary damages under the ADEA unless the state consents to be sued or another exception applies. However, the ADEA still may be enforced against the states by the EEOC, and state employees may sue state officials for declaratory and injunctive relief.

To fill in some of the ADEA gaps in individual protection, complementary state laws have been enacted. State employees in North Carolina, for example, have state-granted protection against age discrimination within the State Personnel System. Governed by state law, all departments, agencies, and local political subdivisions of the State of North Carolina are required to give equal opportunity for employment and compensation without regard to age (40 years of age or older) except where age requirements comprise a bona fide occupational

qualification ("BFOQ") necessary to the proper administration of public business.

Enforcement of the ADEA

The ADEA includes enforcement procedures similar to those in Title VII. The EEOC is the agency with original jurisdiction over charges of age discrimination. A charge of age discrimination ordinarily must be filed within 180 days of the last discriminatory act.

The EEOC will investigate a charge, attempt to reconcile the parties, and then either sue the employer or issue a right to sue letter to the person who has made the charge of age discrimination ("Charging Party"). The Charging Party has 90 days from the issuance of the right to sue letter in which to file an age discrimination suit.

The ADEA prohibits discrimination on the basis of age in all terms of employment. So, it applies not only to hiring, placement, promotions, compensation, demotions, transfer, discipline, and discharge, but also to leave and employee benefit plans such as health coverage and pensions.

ADEA protection applies when a person over 40 is treated less favorably than a person under 40. Its protection can also apply when an over-40 individual has not been hired, has been passed over for a promotion, or has been laid off in favor of a younger person who is also over 40. In that case, however, the age difference must be significant or substantial. The courts have not offered up a precise definition of significant age difference under the ADEA, but nine- or ten-year age differences have been said to be sufficient by the United States Court of Appeals for the Fourth Circuit, which has jurisdiction over federal lawsuits arising in North Carolina.

Furthermore, the ADEA prohibits an employer from publishing advertisements relating to employment that indicate any preference or limitation based on age. EEOC regulations therefore prohibit ads for applicants "age 25 to 35" or for "young people." Exceptions will be made where age is a BFOQ for the position.

The ADEA also prohibits retaliation against any employee who has opposed a practice that is made unlawful by the ADEA, who made a charge of discrimination, or who assisted a co-worker in an investigation, proceeding, or litigation under the ADEA. Illegal retaliation, or employer "payback," includes extreme job actions such as termination, demotion, or pay reduction, or less overt behavior such as an onerous shift change, the relocation of an office, a decrease in administrative support or benefits, a bad evaluation, exclusion from meetings, a bad job reference, or changed job assignments. The test is whether the employer's retaliatory act would chill a reasonable employee's resolve to complain about, or assist in complaints against, discrimination or harassment in the workplace.

There is no top end, generally speaking, to protection against age discrimination. Under the strict letter of the ADEA, an 80-year old has the same protection against age discrimination as a 40-year old. As the population in general ages and the economy further degrades the value of retirement plans, the phenomenon of the "working aged" steadily increases.

The good news is that there is no such thing as reverse age discrimination, so older workers may be favored over younger workers, whether the younger person is under 40 or not. Although a 40-year-old is within the protected class, it would not be illegal for an employer to favor someone even older, a point sometimes made by commentators, but unlikely to give comfort to those labeled as part of the "working aged."

Proving Age Discrimination

What does it take to establish proof of age discrimination? There is no set formula. The following are some

evidence patterns that have been held by various courts to demonstrate sufficient evidence to make out colorable cases of age discrimination:

- Remarks made by a decision maker that age was the "major and only factor" for discharge, and the work involved was "meant for people in their thirties."
- An email to several employees discussing management's intent to go forward with a plan to "strategically hire some younger engineers and designers," combined with unflattering remarks about the lack of flexibility by incumbent employees.
- A manager's statement that he wanted to fire the plaintiff and "replace her with a young chippie with big"
- A statement by a decision maker at the time of termination that a 56-year-old employee was "getting too ... old" and that a 33-year-old employee could "give him more years."
- A memo noting the employee's length of service, that there are 14 sales associates "in their early fifties or older" with the same tenure, that a severance package ought to be directed at them, and that the effect would be to "thin the ranks," together with evidence that younger sales associates took over the employee's territory and that the employee was given inconsistent explanations for his termination, and that the national sales manager and the president made remarks that the employer "needs race horses, not plow horses" and criticizing the "graying" of the sales force.
- Statements by senior management about an employee demoted in a meeting where his age (60) was noted as a negative factor ("you don't need the aggravation, stress"; "going to really be grinding their managers in the future"); senior management's routine unflattering reference to the employee's age, calling him names such as "pops" and "old man"; and an announcement to employees the next day positively emphasizing the successor's youth (e.g., "terrific kid"; "fine, proper young man"; "youth").
- A superintendent's statement to a bus driver that he was too old to drive a bus.
- The statements of a supervisor who fired an employee, warning him that the company wanted "younger single people" and that, because of the employee's age, he "wouldn't be happy there in the future."
- A decision maker's alleged statement that he did not want to hire an "old pilot."

In addition to cases with attention-getting facts like the above, the cases hold that a claim can also be made on circumstantial evidence – for example, a qualified over-40 employee is replaced by a substantially younger individual for reasons that are shown to be pretextual. However, the pitfalls for such cases are many in the absence of dramatic direct evidence of age-based motivation.

Mixed Motive

Age may have been a part of an adverse decision regarding an employee, but the analysis is sometimes complicated by other factors in play which the employer claims are performance-based. Such cases fall under the rubric of "mixed motive." The United States Supreme Court's 2009 decision in *Gross v. FBL Financial Services, Inc.* significantly affected the analysis of age discrimination claims in mixed-motive cases. The Court specifically stated in *Gross* that "the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor." Rather, "the plaintiff retains the burden of persuasion to establish that age was the 'but-for' cause of the employer's adverse action." More specifically, "the burden of persuasion necessary to establish employer liability is the same in alleged mixed-motives cases as in any other ADEA disparate treatment action. A plaintiff must prove by a preponderance of the evidence (which may be direct or circumstantial), that age was the 'but-for' cause of the challenged employer decision." The Court reiterated its position at the end of the majority opinion, stating, "The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision."

The burden remains unequivocally on the plaintiff to prove that age was the but-for cause in a case of alleged age discrimination. This burden of proof under the ADEA is more onerous than in mixed-motive cases arising under Title VII. Under Title VII (sex, race, national origin, color, and religion), the plaintiff has to prove only that the protected trait was a consideration that moved the employer toward the decision – that is, it played a role even if it was not the only reason for the contested job action.

A Senate Bill introduced in the United States Congress in March 2012 would bring the ADEA in line with Title VII in cases of mixed motive. If the Bill is enacted into law, the aggrieved party would have to prove only that age was a motivating factor, not the "but-for" cause. The ADEA, however, remains unchanged on this point at the present time.

Disparate Impact

Disparate impact occurs when the employer's acts or policies are facially neutral, but adversely impact a protected class of employees. When the law allows, disparate impact claims may be established without proof of discriminatory intent.

For many years, it was unclear whether an employee could assert a disparate impact theory of recovery under the ADEA. In 2005, however, the United States Supreme Court held in *Smith v. City of Jackson* that the ADEA allows disparate impact claims. Although counterintuitive in light of *Gross*, if the reduction-in-force of 30 employees results in 30 over-40 employees losing their jobs, then reason suggests that the purportedly neutral rationale should be scrutinized.

In order to bring a disparate impact claim under the ADEA, a plaintiff must first establish a prima facie case of age discrimination by demonstrating that an employment practice has disparately impacted members of the protected class to a degree that is statistically significant. The employer may then rebut the prima facie case by proving that the action was taken based on a "reasonable factor other than age" ("RFOA").

In *Meacham v. Knolls Atomic Power Laboratory*, the United States Supreme Court held that the employer has the burden of proving that its action was reasonable. By invoking the shield of a statutory exception (such as an RFOA), the employer must bear the burden of proving that its actions were justified. Thus, disparate impact is a viable theory under which ADEA plaintiffs may recover.

Hostile Work Environment

Making out a case of hostile work environment based on age under the ADEA is much more problematic than making out a case of harassment based on sex, race, and national origin. Theoretically, a case of age harassment could be made if the work environment, to paraphrase the United States Supreme Court's formula for sexual harassment, was permeated with discriminatory "ageist" intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. Stray workplace age-based or ageist remarks that have no demonstrated connection to the job action subject to the employee's complaint are regularly held to be insufficient to support an age discrimination case. General statements such as older workers are not as aggressive as younger employees, or expressions of concern about the higher costs of employees with greater seniority, or a manager's comment that she did not know the plaintiff was "that old" all have been held too abstract, insufficient, or irrelevant to create liability. However, it is probably a good policy for employers not to create a regime in which banter (e.g., "you are old as dirt") could give rise to a lawsuit.

Conclusion - To Be Continued

This article will be continued in the Summer Edition of Legal Currents. It will address additional issues related

to the "working aged," employer compliance with the pertinent regulatory schemes, and an update on the progress of the now-pending Senate Bill to amend the ADEA.

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