

## **ADEA: Your Age and Your Job**

By: Nathan Davidovich  
Copyright (c) April 2011

Recent years have seen many companies downsizing and laying off employees. While many have been for economic reasons, a growing number of workers, over the age of forty, find themselves replaced by younger workers. More than 23,000 age-related employment complaints were filed with the Equal Employment Opportunity Commission in 2010. The majority of the cases involved either layoffs or dismissals. Older workers are often the most likely to go, because of their higher pay and the expectation that they will generate higher health costs.

The Age Discrimination in Employment Act (ADEA), is a federal law which prohibits employers from discriminating on the basis of age. An employee is protected from discrimination based on age if he is over 40. If you feel that you have been a victim of age discrimination, it is important that you know your legal rights, and the actions you must take to prevent loss of your rights to a remedy. **This article is not designed to provide legal advice or render legal opinions for specific situations. The law in other states may vary from Colorado on these issues. For specific legal questions, contact the attorney of your choice. If you wish to consult with the author on any matter relating to Colorado employment issues, you may contact him at (303) 825-5529 or by email at [nathandavidovich@talk-law.com](mailto:nathandavidovich@talk-law.com).**

### **WHAT IS AGE DISCRIMINATION?**

Age discrimination is the process of making decisions affecting an employee based wholly, or partly, upon the age of the employee, except in those cases where age is a bona fide occupational qualification. Age discrimination can take many different forms. It can consist of age related comments made by managers or executives, followed by some type of adverse employment action or decision orchestrated by such managers. Such action might include a failure to promote, less favorable employment conditions, disciplinary proceedings, layoff or termination. It may consist of situations in which there are no comments to which one can point, but there

is a pattern that older workers are treated differently. It may consist of being selected for a reduction in force, while at the same time, younger employees, with less experience, are retained. The key in determining whether you have a claim under the ADEA is whether the comments about age, or the age discriminatory actions, in fact were the reason, or the factors, which made a difference, for the adverse employment action.

### **HOW TO DETERMINE IF YOU HAVE BEEN A VICTIM OF AGE DISCRIMINATION**

In practice, there is no black and white rule by which you can decide if age discrimination has occurred in your case. The fact that you are over forty and have had an adverse employment experience does not necessarily mean that you have been the victim of age discrimination. Employers have the right to discipline and fire employees of any age, as long as the decision is not based upon discriminatory or other impermissible factors. I recommend that, if you in any way suspect that you have been a victim of age discrimination, you should immediately arrange for a consultation with a knowledgeable employment attorney.

After reviewing the facts of your case, a seasoned attorney will be able to give you an opinion as to whether any adverse employment action was the likely result of age discrimination. Prompt consultation with an attorney is extremely important due to various laws that require you to take certain action within a certain period of time after the occurrence of discrimination. Failure to act in a timely manner may result in loss of your rights to recover, even if you can prove the existence of discrimination. Also, with the passage of time, valuable evidence can be lost and the memories of witnesses may fade.

### **WHAT PROCEDURAL STEPS MUST BE TAKEN TO PRESERVE A CLAIM?**

In order to preserve your claim, there are strict time frames which you must follow. In order to obtain the right to sue in federal or state court you must first file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). That charge must be filed within 180 days of the alleged act of discrimination. Many states, such as Colorado, have a law, which prohibits age discrimination in employment and authorizes a state agency to grant relief. In such cases, the charge must be

filed, with the EEOC, within 300 days of the last act of discrimination, or sooner in certain instances. If you do not file an EEOC charge within the required time period, you will probably be prevented from further pursuing your rights. Different from other types of claims of discrimination, where an EEOC Charge is filed, on an ADEA claim a lawsuit may be commenced after the Charge has been filed for at least 60 days. Failure to follow the required time periods may cause you to lose your rights to seek a remedy for age discrimination under the ADEA. If one awaits a decision by the EEOC on the Charge, and the issuance of a Right to Sue Letter, a lawsuit on an age claim must be filed within 90 days after the receipt of such letter from the EEOC.

Because of the intricacies of the various time barriers, it is most important to consult with an experienced employment lawyer, who will be able to guide you through this maze. I make this recommendation despite the fact that you do not need a lawyer to file a charge with the EEOC. However, my experience has taught me that it may be a serious mistake to try to proceed on your own, even as to the initial filing of a charge. If you fail to include certain allegations, you may be prevented from bringing them up in a later lawsuit.

### **HOW TO PROVE AGE DISCRIMINATION**

It is a rare case these days where you have direct evidence of discrimination of any kind. How do you prove an age discrimination case where you do not have direct evidence of age discrimination? Fortunately, the United States Supreme Court has given us guidance in such situations. In cases brought under the ADEA, an employee need not prove the employer's discriminatory intent with direct evidence but may rely on indirect proof. Under the indirect approach to prove discrimination under ADEA, the employee, in order to meet his initial burden of proof, must show that 1) he was forty years or older at the time of discrimination; 2) he suffered an adverse employment action; 3) he was qualified for the position at issue; and 4) he was treated less favorably than younger, similarly situated, employees (or he was replaced by a substantially younger, less qualified, person).

Once the employee has established these elements, the employer is required to produce evidence justifying its employment decision, on a nondiscriminatory basis. Once the employer has produced credible evidence in support of its actions, the employee must then show that the

reason advanced by the employer is merely a pretext for discrimination. The employee must prove that age was the determining factor in the adverse employment decision. It is only after that point has been reached that the judge or jury can determine if the employee is entitled to recovery from the employer.

It should also be borne in mind that age discrimination may occur without a specific deliberate intent of the employer, if the employee was a victim of a company policy that caused harm to older workers and went beyond "reasonable" business considerations.

### **AMOUNT OF RECOVERY**

Under the ADEA, an employee who has been a victim of age discrimination, resulting in an adverse employment action, may recover back wages and benefits, reinstatement to the former position, attorney fees and court costs. If the discrimination was intentional and willful, the employee may be awarded liquidated damages in the same amount as the lost back pay and benefits. Damages may be recovered for the time period of up to two years before filing suit, or up to three years in cases of willful violations of the ADEA. If the employee, for valid reason, cannot be reinstated, the court may award a dollar amount for future loss of earnings and benefits, calculated over a set number of years. Having said that, one must realize that, wherever possible, courts prefer reinstatement instead of awards for future losses. In an ADEA case, unlike other cases of discrimination, there is no recovery for emotional distress, or punitive damages. Depending on your individual circumstances, you may be entitled to additional recoveries under state, rather than federal, law.

### **LIMITATIONS ON RECOVERY AGAINST STATE OR STATE AGENCY**

The United States Supreme Court has ruled that the Eleventh Amendment to the U.S. Constitution grants immunity to a state or state agency from claims under the ADEA. That means that if you are employed either by a state, or a state agency or a state university, you will not be able to claim damages under the ADEA. However, most states have their own age discrimination statutes, which will provide relief. It is important to remember that each state has its own statute of limitations (time during which a claim may be brought) and procedural requirement for filing such a

claim, and your claim may be barred unless you comply with these laws.

## CONCLUSION

There are many more intricacies involved with the ADEA than have been discussed in this article. Learn more about protecting your rights by selecting a competent lawyer to represent you.

[Nathan Davidovich](#) practices employment law in the state of Colorado, and he is available for consultation on any matters arising in the state of Colorado. Please contact Nathan Davidovich by email at <mailto:nathandavidovich@talk-law.com>, or by telephone at (303) TALK-LAW/(303) 825-5529.

**Nathan Davidovich, Attorney at Law**  
**Davidovich Law Firm, LLC**  
**219 S. Holly Street**  
**Denver, Colorado 80246**  
**Phone: 303-825-5529/(303) TALK-LAW**  
**Email: [nathandavidovich@talk-law.com](mailto:nathandavidovich@talk-law.com)**  
**Web: <http://www.talk-law.com>**