

REDUCTION IN FORCE – HAVE YOU BEEN DISCRIMINATED AGAINST?

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With the economic downturn in the country being felt by employees in the largest corporations to those in the smallest corporations, a number of reductions in force (RIF) have already been announced and many more will probably occur before the economy turns around. For the year 2010, the number of people unemployed in the United States, was nearly 15 million people. If you are facing a situation where you have been terminated from your job because of a reduction in force, an analysis should be made as to whether or not your employer's choice of yourself as part of the downsizing was motivated, in whole or in part, by any discriminatory reasons. Even though business necessity might force employers to reduce their workforce, the economic downturn does not allow them to discriminate, in violation of Federal or state law, in the process of selecting those employees to be downsized.

Since many older workers are also being paid higher salaries paid by their employer, the older worker may become a logical target by the employer. If the employer's selection criteria target only older workers, there may be a violation of the Federal Age Discrimination in Employment Act (ADEA). Even if the employer has the best of intentions, and has no intention to discriminate on the basis of age, the actual fact of the selection process may result in age discrimination.

The purpose of this article is to highlight some of the general provisions of age discrimination, as they might apply to a reduction in force. However, each individual case must be evaluated in accordance with the facts in that case. Therefore, this article is not intended to provide legal advice specific to any case. I therefore recommend that you consult with an employment attorney of your choice for specific advice regarding your situation.

AGE DISCRIMINATION – WHAT DOES IT LOOK LIKE?

Under the ADEA, it is unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any

individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age. A claim of age discrimination under the ADEA can be proven by either direct or circumstantial evidence. One can also prove discrimination through direct evidence by establishing proof of an existing policy which itself constitutes discrimination. In other cases, the affected employee may seek to prove discrimination through circumstantial evidence.

Age discrimination is the process of making decisions affecting an employee based wholly, or partly, upon the age of the employee. Age discrimination can take many different forms. There are basically 3 different types of a RIF that might be indicative of discrimination. They are, individual disparate-treatment claims, group disparate-impact claims, or pattern-or-practice claims.

The individual disparate-impact claim involves action directed against a single individual, who is subject of the RIF, but does not involve a broader sweep of the brush of discrimination. A disparate impact-claim may consist of age related comments made to or about the affected employee, by managers or executives, involved in the decision to RIF the individual, before or accompanying the downsizing.

A disparate impact claim against a group of employees may consist of situations in which there are age related comments made to or about older employees, by managers or executives, involved in the decision to put a RIF into effect, before or accompanying the RIF.

A pattern or practice claim involves a RIF where there are no comments to which one can point, made before or accompanying the downsizing, but there is a pattern that older workers are treated differently. It may consist of being selected for reductions 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 part of the reason, for your termination. In other words, can you say that the termination would not have occurred but for the discrimination?

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

The fact that you are over age forty and have been fired due to downsizing does not necessarily mean that you have been the 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 situation. Unless you have an employment contract that limits an employer's right to fire you, employers have the right to 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, and researching the legal decisions with similar fact patterns, a seasoned attorney will be able to give you an opinion as to whether your termination 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 that 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 that 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 with the Colorado Civil Rights Division within 180 days. If you do not file either of these charges within the required time period, you will probably be prevented from further pursuing your rights. On an ADEA claim, different from other discrimination charges, where a right-to-sue letter must be issued by the EEOC, before the filing of a private action, a private lawsuit

may be filed after the Charge has been pending for 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 a right-to-sue letter is issued by the EEOC, a lawsuit on an age claim must be filed within 90 days after the receipt of such letter.

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

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, in order to establish a *prima facie* case of age discrimination in termination, an employee must show the following four factors:

- (1) The employee was a member of the protected work group, meaning that he/she was over the age of 40;
- (2) The employee was doing satisfactory work;
- (3) The employee suffered an adverse employment action (in a RIF case this means termination); and
- (4) The employer filled his position with a younger person. (This 4th factor is subject to modification in a RIF case).

Once an inference of discrimination is made by the above factors the

employer, in defending such a claim, must show that there were reasonable factors other than the age of the employee upon which a decision was made. Once the employer presents that type of evidence, the employee, in order to prevail in this type of litigation, must prove by additional evidence, that the employer's reason is simply a pretext for discrimination. The employee must prove that age was the "but for" factor in the adverse employment decision. In other words, the termination would not have occurred "but for" the age of the employee. 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. Practices that adversely impact older workers more than younger workers may violate federal law regardless of the intent of the employer. An employer has the affirmative duty to persuasively produce evidence establishing that the decision to terminate a specific employee or class of employees was based on reasonable factors other than age.

AMOUNT OF RECOVERY

Under the ADEA, an employee who has been a victim of age discrimination as a result of a RIF, 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, including Colorado, have their own age discrimination statutes that 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 filings such a claim, and your claim maybe 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.

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