

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. Over the past twelve months there has been an increase in unemployment of nearly 3 million workers, bringing the total unemployed in the United States as of the end of October, 2008 at some 10 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?

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. It can consist of age related comments made by managers or executives, preceding or accompanying the downsizing. 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 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.

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 case. 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, 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 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 with the Colorado Civil Rights Division within 180 days. If you do not file an EEOC charge within the required time period, you will probably be prevented from further pursuing your rights. On an ADEA claim a right-to-sue letter may be requested from the EEOC 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. A lawsuit on an age claim must be filed within 90 days after the receipt of a right-to-sue 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

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 a 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. The United States Supreme Court in *Smith v. City of Jackson, Miss.*, 544 U.S. 22 (2005), ruled that practices that adversely impact older workers more than younger workers may violate federal law regardless of the intent of the employer. There was uncertainty as to whether the employer or employee had to prove or disprove that the actions of the employer, in a RIF case, were reasonable. The United States Supreme Court ruled in *Meacham v. Knolls*, 128 S. Ct 2395 (July 2008), that 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 reduction in force, 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 filings 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.

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