

ADEA: Protect Yourself Against Age Claims

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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. Age-related employment complaints, according to the U.S. Equal Employment Opportunity commission, amounted to over 16,000 in 2006. 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. It is important that all supervisors and management personnel know how to avoid discriminating against an individual based on age.

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, accompanied by some type of adverse employment action or decision. 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 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. One of the keys in determining whether your company has violated the ADEA is whether the comments about age, or the age discriminatory actions, in fact were the reason, or part of the reason, for the adverse employment action.

PROVING AGE DISCRIMINATION

An employee need not have direct evidence of age discrimination to prove a case. The United States Supreme Court has ruled that 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 the initial burden of proof, must show that 1) he is a member of the class protected by the statute; 2) he suffered an adverse employment action; 3) he was qualified for the position at issue; and 4) he was treated less favorably than others.

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 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.

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 the employee's individual circumstances, there may be entitlement to additional recoveries under state, rather than federal, law.

PROCEDURAL STEPS TO DEFEND AGAINST AN AGE CLAIM

As in all adverse employment actions against an employee the company should, contemporaneously with the action, make written notes of all of the non-discriminatory or business reasons for its actions. As stated above, this may be critical in defeating the employee's attempted proof of discrimination. Close involvement of your attorney before the action is taken is advisable.

In order for an employee to preserve an age claim, he or she 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. Once the charge is filed, the employer will be given a time period to respond, in writing, to the charges. The EEOC investigator may make specific requests for the production of certain documents and information. An experienced trial lawyer will be able to guide you through this process.

The goal at the EEOC will be to successfully demonstrate that the claim is not justified by the evidence and obtain a finding of no probable cause. Sometimes that finding will dissuade an employer from proceeding further with litigation in state or federal court.

However, if the employee still wishes to pursue the claim, a lawsuit must be filed within 90 days of receipt of the Right to Sue Letter from the EEOC. If a lawsuit is filed you will need seasoned trial counsel to represent you.

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, call our office today at 303-825-2700, or directly to Nathan Davidovich at 303-TALK-LAW (303-825-5529).

FOR A REVIEW OF YOUR POLICIES AND PRACTICES FOR PREVENTION OF AGE DISCRIMINATION OR FOR DEFENSE OF A CLAIM PLEASE CONTACT NATHAN DAVIDOVICH BY EMAIL AT nathandavidovich@talk-law.com, by telephone AT (303) TALKLAW ((303) 825-5529),or by fax at (303) 265-9797.

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