

AGE DISCRIMINATION: AN OVERVIEW OF THE LAW

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The Age Discrimination in Employment Act (ADEA) and the Pennsylvania Human Relations Act (PHRA) are the federal and state laws which prohibit age discrimination against applicants or employees aged forty or over. Those statutes make it unlawful to refuse to hire, to discharge, or otherwise discriminate against any individual with respect to compensation or terms, conditions or privileges of employment because of the individual's age. People under forty years of age are not protected by the federal and state age discrimination laws. Therefore, if an employer refused to hire an applicant who was thirty-nine, even if the applicant was deemed "too old," that would not be unlawful under the age discrimination statutes. However, if the applicant were one year older, the applicant's age would become an unlawful consideration.

To establish a prima facie case, or a presumption of age discrimination under either the federal or state statutes, plaintiffs need only demonstrate that: (1) they were in a protected age group (i.e., over 40 years old); (2) they were qualified (e.g., possessed a teaching certificate); (3) they were nevertheless adversely affected (i.e., fired, not promoted, not hired); and (4) the defendant selected someone younger with similar qualifications to perform the work. A presumption of age discrimination is fairly easy to establish. For example, a certified teacher over forty years of age who applies for a teaching position and is turned down in favor of a younger teacher has proven a prima facie case of age discrimination under the state and federal statutes. Moreover, in nearly every age discrimination case, the plaintiff supports his or her case with a litany of recommendation letters, positive observation reports and positive performance evaluations. These documents help to establish the plaintiff's qualifications for the position.

Once a plaintiff has proven a prima facie case of age discrimination, the burden shifts to the employer/defendant to show the existence of a "legitimate, non-discriminatory reason" for the adverse employment action. The burden on the employer is also relatively simple to meet. For example, the employer can produce evidence that the younger applicant, who was ultimately favored, was more qualified than the plaintiff. Once the employer establishes this legitimate reason for its decision, the burden shifts back to the plaintiff to prove that the reasons set forth by the employer are not true, or are "mere pretext" for age discrimination. It is up to the jury to determine whether the evidence supports the employer's reasons for its actions, or shows that age was a "determinative factor" in the employer's decision related to the plaintiff.

In applying the ADEA and the PHRA, the federal and state courts have disagreed as to what type or level of proof is necessary to show that age is a "determinative factor" in an employment decision. Some courts have held that in order for a plaintiff to avoid having his or her case dismissed, there must be some evidence that discrimination actually motivated the employment decision. In *Vaughan v. MetraHealth Cos.*, 145 F.3d 197 (4th Cir. 1998), for example, the court held that the employee's reliance on evidence that the employer departed in some ways from its own policies in reducing its workforce, as well as other indirect evidence, was not enough to allow the case to continue. Other courts

have held that it is enough for an employee to simply cast doubt on an employer's stated nondiscriminatory reason for its actions for a case to proceed to the jury. For example, in *Beaird v. Seagate Technology Inc.*, 145 F.3d 1159 (10th Cir. 1998), *cert. denied*, 119 S. Ct. 617 (1998), the court held that evidence that the employer departed from its own policies in a reduction in force was enough to allow the case to proceed to trial. These two cases illustrate that the law is not yet entirely defined. As the courts continue to decide age discrimination cases, the law will continue to develop.

It is important to note that the state and federal age discrimination laws do not require school districts to categorically hire, promote, or select older employees in preference to younger employees. The laws do, however, require school districts to eliminate age as a consideration in any employment decision. When a school district chooses to hire a younger employee over an older employee, there must be a "legitimate, nondiscriminatory reason" for doing so. To avoid any conflicts, the "legitimate, nondiscriminatory reason" must be clear and well documented.

Most school districts will confidently state that age is not a conscious or direct consideration in any of their employment decisions. In fact, it is rare that employers will admit to such instances of discrimination. However, this conclusion will not insulate school districts from age discrimination lawsuits. Plaintiffs typically rely upon indirect evidence for proof of discrimination. The following are examples of indirect evidence of discriminatory practices:

- Asking an employment agency to send only younger job applicants.
- Withholding training or opportunities from older workers.
- Allowing younger workers certain benefits, such as flexible schedules, part-time work, job sharing and telecommuting, while denying such options to older workers.

In addition, comments relating to age are frequently used as indirect evidence of age discrimination. For example, in *Schnidrig v. Columbia Machine, Inc.*, 80 F.3d 1406 (9th Cir. 1996), a sixty-one-year-old vice president and long-time employee who was denied a promotion to president was informed that the board of directors was looking for a candidate "forty-five to fifty years old." The court found that the vice president's evidence was sufficient to allow him to proceed to trial. In *Hindman v. Transkrit Corp.*, 145 F.3d 986 (8th Cir. 1998), the Court ruled that derogatory age-related statements such as ("You're too old to be climbing around like that"), made three years prior to the demotion of an employee, were relevant to determine age discrimination. Conversely, in *Hoffman v. MCA Inc.*, 144 F.3d 1117 (7th Cir. 1998), the court found that the supervisor's reference to the company's need for "fresh legs," and his remarks to a fifty-four-year-old sales representative that he was "getting old" after he complained of aches or pains, were held as nothing more than evidence of a recognition of the employee's age. In that instance, the court characterized these as "conversational jabs in a social setting," noting that the case would be different if these comments were in response to the question, "Why are you reducing my workload?" or "Why was X promoted instead of me?"

Statistics are also frequently used as indirect evidence to prove discrimination. For example, if the plaintiff can show that many people under forty have been given similar positions, and only a few or no people over forty have, or if several employees 40 years or older have applied for and been passed over for certain positions or promotions given to younger employees, the plaintiff might be able to prove his/her case with statistics. If the numbers are good enough, they can be very strong evidence of discrimination.

Damage awards in age discrimination cases can be very large. The law limits damages to back pay (an employee's salary and the value of her benefits since she was fired), possibly front pay (if the plaintiff is likely to have great difficulty finding another job) and plaintiff's attorneys' fees. If the jury decides that the discrimination was "willful," double back pay damages can be awarded. Pennsylvania also allows age discrimination plaintiffs to recover compensatory damages for emotional harm.

Given the potential consequences, it is worthwhile to review your policies and practices to ensure that your employees and administrators recognize age bias and discrimination as a pervasive, escalating issue. The following are a few suggestions for keeping age discrimination litigation in check:

- Do an audit to assess your organization's "culture." How do employees feel about older workers and how do those feelings manifest themselves in the workplace? In the school district setting, messages often emanate from the Superintendent and administrators and are picked up by teachers.
- Initiate a dialogue between administrators and coordinators of different schools and different departments regarding age discrimination. Discuss the issue at appropriate professional organization meetings to find out how other school districts are dealing with it.
- Review and, if necessary, revise hiring policies, applications, training programs, recruiting methods, job designs, and evaluations to eliminate any discriminatory language and/or implications.
- Expand preventative training on age bias.
- Tap into agencies and networks that involve the older adult population when hiring and recruiting workers.
- Develop community relations programs to support services for older adults in the community as part of your school district's agenda.
- Build morale and higher productivity by demonstrating to older workers that they are valued and appreciated.

It is undeniable that the U.S. population is growing older. Given this fact and the ongoing potential for large verdicts in such age discrimination cases, the exposure to such lawsuits will undoubtedly grow. Employers who review their employment policies and practices and make the necessary adjustments will save significant time and money by avoiding potential lawsuits. In addition, those employers who make well documented appropriate employment decisions will be able to defend those decisions should such litigation occur.

Clients who have questions regarding issues discussed in this article, or any education law matter, should feel free to call us at 215-345-9111 or 570-654-2210.