

# RECRUITING, HIRING, AND SUPERVISING WORKERS WITHOUT VIOLATING THE AGE DISCRIMINATION IN EMPLOYMENT ACT

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*by Janet A. Savage  
and Brett C. Painter*

### I. Brief Summary of the ADEA

Age discrimination is prohibited under the Age Discrimination in Employment Act, 29 U.S.C.S. § 621 *et seq.* (ADEA). The ADEA was modeled after Title VII which prohibits discrimination in employment because of race, color, religion, sex, or national origin. Like Title VII, the ADEA deals with all aspects of discrimination in the workplace: hiring, assignments, promotions, compensation, environment, and discharges. The ADEA prohibits age discrimination against individuals who are at least 40 years old. In 1986, the upper age limit of 70 years old was removed so that the statute now prohibits discrimination regardless of whether an employee is beyond the age of 70.

Since the ADEA was modeled after Title VII, courts have given it a parallel construction in regard to proving claims for age discrimination. Thus, the disparate treatment model of proof (requiring proof that a certain employee was specifically discriminated against) and the disparate impact model of proof (whereby a specific employment practice can be shown to adversely affect all employees within a certain protected group) are both available to prove a claim of age discrimination.

- A. Disparate treatment. Under the disparate treatment model, if the plaintiff presents credible direct evidence of the employer's decision being based upon age, the employer then must prove that the same decision would have been made for legitimate reasons. Unless the employer can show such legitimate reasons for its decision, the plaintiff will succeed in showing age discrimination.

If the plaintiff does not have direct evidence, the plaintiff can create a *prima facie* case of age discrimination through circumstantial evidence tending to show that age was the reason for the employment decision. This proof scheme involves showing that a qualified person over the age of 40 was treated differently than a younger person, i.e., discharged or not promoted while a similarly situated but younger person is retained or promoted, thus creating an inference of age discrimination. Once the *prima facie* case is shown, the employer has the burden of presenting a "legitimate non-discriminatory reason" for its actions. Simply denying age discrimination will not suffice. If the employer presents a legitimate,

non-discriminatory reason, the evidentiary burden shifts back to the plaintiff to meet the ultimate burden of convincing the fact finder that the employer's decision was motivated by age factors.

- B. Disparate impact. The disparate impact method is somewhat more complicated in age discrimination cases since age is often related with considerations which may otherwise be legitimate reasons for making employment decisions. For example, if an employer has a standardized physical fitness requirement, it is likely that older employees statistically will encounter more difficulties in complying with the requirement. Accordingly, although the specific employment practice, the physical fitness requirement, is applied equally to all age groups, it is subject to the argument that it has an unjustified disparate impact on older workers. Courts will often require that the employer show either that the facially neutral practice which has a disparate impact on older workers was required under the "business necessity defense," or some sort of "reasonable relationship" standard modifying the stricter business necessity defense. The employer, therefore, might be required to justify a valid reason for an employment practice which has a disparate impact on older workers although the practice is applied uniformly to all workers.

Statistical evidence can be used to support a disparate treatment case or to show that a specific employment practice had a disparate impact based on age. Generally, the statistics must involve a fairly large number of employees and must show a "stark pattern" unexplainable on grounds other than age.

## II. Recruiting

Employers often rely on various forms of advertisements to fill open employment positions. In placing such advertisements, however, employers should be aware that a seemingly innocuous statement may be used as evidence of age discrimination.

- A. Improper ads. An advertisement generally will violate the ADEA if the language of the ad and its context demonstrate that persons over 40 will be discouraged from applying. For instance, the following statements may be deemed a violation of the ADEA:
- Ads seeking "college students" or "recent college graduates." These ads may deter the employment of older workers because persons over 40 are less likely to be recent graduates. *See* 29 C.F.R. § 1625.4; *Hodgson v. Approved Personnel Service, Inc.*, 529 F.2d 760 (4th Cir. 1975) (use of the phrase "recent graduate" in advertisement was not merely informational, but violated the ADEA by deterring older workers from applying).

- Ads placing a limit on the years of experience or specifying a low number for years of experience. For example, when an ad specifies 3 to 5 years of experience, it often excludes workers over 40 who may have much more experience than the employer is seeking. *See* 29 C.F.R. § 1625.4; *DeBur v. Olds Products Co.*, 1996 WL 277644 (N.D. Ill. 1996) (limiting candidates to 5 to 10 years of experience provided circumstantial evidence of discriminatory intent); *Geller v. Markham*, 635 F.2d 1027 (2nd. Cir. 1980) (hiring only teachers below a certain level of experience violated the ADEA; correlation between age and experience caused a disparate impact on teachers over 40).
  - Ads using terms such as “young”, “boy”, “girl”. These words also have the effect of deterring older workers from applying and can violate the ADEA. *See* 29 C.F.R. § 1625.4.
  - Ads using phrases such as “age 40 to 50”, “age over 65”, “retired person”, or “supplement your pension.” These phrases have the effect of discriminating against others within the protected group and generally are prohibited. *See* 29 C.F.R. § 1625.4.
- B. Qualifications. Ads which set forth the necessary job-related qualifications will not amount to a violation of the ADEA, so long as those qualifications are not age-based. *See Boyd v. City of Wilmington*, 943 F. Supp. 585 (E.D. N.C. 1996) (ad stating that certain degrees were preferred does not violate ADEA where it merely set forth the minimum educational requirements).
- C. Suggestions. Courts generally will look at an advertisement in its entirety to determine whether it violates the ADEA, including an analysis of the results of the ad on the employer’s hiring practices. To lessen the likelihood of an ADEA claim, employers should (a) list the minimum level of experience needed (e.g., at least 4 years of experience in the particular field) rather than a minimum and maximum amount; (b) describe the responsibilities of the job, rather than the experience range desired; (c) provide other generic information such as the starting salary of the job.

### III. The Hiring Process

- A. Employment applications. A request on the part of an employer for information relating to a applicant’s age such as “date of birth” or “state age,” is not, in itself, a violation of the ADEA. Similarly, a request for the “year of degree” does not constitute discrimination *per se*. However, because such requests may tend to deter older applicants or otherwise indicate age discrimination, these requests will be closely scrutinized to assure that the request is for a permissible, and not a discriminatory, purpose. *See* 29 C.F.R. § 1625.5.

- B. Interview questions. As with any protected class, interviewers should avoid questions specifically related to an applicant's age or questions designed to elicit information about an applicant's age. Unless being a certain age is a "bona fide occupational qualification" (a difficult standard to meet -- see below) for the position at issue, such questions likely are unnecessary and dangerous. Hence, as with employment applications, while such questions may not violate the ADEA *per se*, employers always must keep in mind that questions which seem harmless on their face may be used as circumstantial proof of age discrimination.
- C. Examinations and employment guidelines. Employers sometimes require candidates to undergo some form of facially neutral examinations prior to employment. Employers must be wary, however, not to create guidelines or testing that vary based on the employee's age or that are unique to employee's over a certain age. Similarly, employers should not adopt facially neutral tests that have a disparate impact on candidates over the age of 40. For instance, an eye exam or computer proficiency test may have the impact of weeding out employees who are in the protected age group, depending on how the test is used. Therefore, employers should determine in advance whether examinations are necessary for the position in question and whether the tests can have a disparate impact on any individual in a protected class.
- D. Contract age limits. It is not necessarily age discrimination for an employer to negotiate a contract for an employee to work until a certain age. *See Harrington v. Aetna-Bearing Co.*, 921 F.2d 717 (7th Cir. 1991) ("It is not discrimination to offer an employee a contract that does not last forever, including even an age 70 cap, as long as after its expiration independent ADEA violations do not occur.").
- E. Hiring older workers. Hiring older workers may help reduce or weaken ADEA claims because they demonstrate a lack of discriminatory animus. *See Lowe v. J.B. Hunt Transport, Inc.*, 963 F.2d 173 (8th Cir. 1992) ("It is simply incredible . . . that the company officials who hired [plaintiff] at age 51 suddenly developed an aversion to older people less than two years later."); *Proud v. Stone*, 945 F.2d 796 (4th Cir. 1991) ("[E]mployers who knowingly hire workers within a protected group seldom will be credible targets for charges of pretextual firing.").
- F. Rejecting applicants. When rejecting an applicant for employment, employers should limit their explanation to a statement that the company hired the applicant who best fit its needs. Employers should stay away from sensitive terms such as "overqualified" or other explanations related to experience or qualifications. *See Taggart v. Time, Inc.*, 924 F.2d 43 (2nd Cir. 1991) (use of the term "overqualified" may be indicative of age discrimination and could support a plaintiff's ADEA claim); *Hamm v. NYC Office of the Comptroller*, 1998 WL 92395 (S.D.N.Y. 1998) (same).

#### IV. Supervision of Older Employees

- A. The younger manager. A common problem is created when an employer puts a younger manager in charge of employees over 40. This problem is exacerbated when the younger manager is not sensitive to issues which may arise as a result of an age gap between she and her subordinates. Older workers often do not appreciate being given orders and direction from someone who they perceive to possess inferior experience and knowledge. Employers must be sensitive to these issues and train their managers how to avoid and deal with these potential conflicts in the workplace.
- B. Age-related jokes and comments. While sometimes condoned by society at large, age-related jokes and comments often serve as evidence of discriminatory intent in ADEA cases. Many employees do not appreciate the risks that are created when they refer to their older co-workers as "old man," "old fart," "grams," "blue/silver hair," and "geezer." The Tenth Circuit has held that "stray remarks" are insufficient to support an ADEA claim. *See Cone v. Longmont United Hospital Ass'n*, 14 F.3d 526 (10th Cir. 1994) (age-related statements such as needing some "new young blood" are insufficient alone to establish age discrimination). However, when these remarks are taken in conjunction with other evidence of age discrimination, they may get to -- and be lethal in front of -- a jury. *See Normand v. Research Institute of America, Inc.*, 927 F.2d 857 (5th Cir. 1991) (references such as "old geezers," "old grandad," and "old buzzard" were sufficient to sustain a jury finding of age discrimination). Thus, employers should conduct the necessary sensitivity training to prevent such comments and jokes from taking place.
- C. Questions about retirement. Like age-related comments, questions concerning retirement frequently serve as a battle ground in ADEA lawsuits. Several courts have come to the conclusion that a mere questions about retirement, without more, do not constitute age discrimination. *See McCann v. Litton Systems, Inc.*, 986 F.2d 946, 948-949 (5th Cir. 1993) (questions about retirement plans did not establish age discrimination); *Colosi v. Electri-Flex Co.*, 965 F.2d 500, 502 (7th Cir. 1992) ("But a company has a legitimate interest in learning its employees' plans for the future, and it would be absurd to deter such inquiries by treating them as evidence of unlawful conduct."); *Csicseri v. Bowsher*, 862 F. Supp. 547, 572 (D.D.C. 1994) (statements about retirement plans "could be attributed to friendly conversation as many people look forward to retiring. They could also reflect personnel or staffing concerns on the part of his supervisors."), *aff'd*, 67 F.3d 972 (D.C. Cir. 1995)(table). However, as with age-based comments, questions about retirement can serve as potent evidence for an age discrimination plaintiff who has other evidence to support an ADEA claim. Accordingly,

employers should train their supervisors to avoid such questions, except in the rarest of circumstances.

- D. Performance standards and discipline. It goes without saying that performance standards and discipline must be applied equally and consistently to all age groups. *See Corbin v. Southland Int'l Trucks*, 25 F.3d 1545 (11th Cir. 1994) (summary judgment inappropriate where older employee was terminated for "bad attitude," but younger employee written up for "bad attitude" was not terminated); *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990) (an employer cannot "[come] down hard on an older worker's deficiencies while supplying excuses for the greater deficiencies of the younger worker"). A lack of uniformity in the performance standards and discipline between younger and older workers will create the evidence necessary to support a disparate treatment claim.
- E. Documentation of performance problems. It is critical that employers document poor performance of any employee, including employees over 40. One of the biggest problems that employers face in ADEA trials is the lack of sufficient documents to support an employer's claims of poor performance. *See Lloyd v. Georgia Gulf Corp.*, 961 F.2d 1190 (5th Cir. 1992) (despite employer's "[extensive testimony]" concerning poor performance, the employer "[failed to produce a single document to support that defense]" -- a jury can reasonably infer pretext in such circumstances).
- F. Decisions based on salary/costs. There is a split in authority on whether salary and/or costs are legitimate considerations in making employment decisions with respect to older workers. One line of cases holds that there is nothing in the ADEA that prohibits an employer from making employment decisions that relate an employee's salary to contemporaneous market conditions and concluding that a particular employee's salary is too high. So long as the employer's decisions view each employee individually on his or her merits, do not impose a general rule that has a disparate impact on older workers, and are based solely on financial considerations, the employer's actions are not barred by the ADEA. *See DiCola v. SwissRe Holding, Inc.*, 996 F.2d 30 (2nd Cir. 1993) (summary judgment in favor of employer affirmed where terminated 49-year-old made \$13,000 more a year than 39-year-old); *Gray v. York Newspapers, Inc.*, 957 F.2d 1070 (3rd Cir. 1992); *Bay v. Times Mirror Magazines, Inc.*, 936 F.2d 112 (2nd Cir. 1991) (reorganization and cut-back based, in part, on high salary). However, other courts have reached the opposite conclusion. *See Jardien v. Winston Network, Inc.*, 888 F.2d 1151 (7th Cir. 1989) (replacement of older employee with younger, lower-salaried employee to save salary costs is not a defense to an ADEA claim); *Tullis v. Lear School, Inc.*, 874 F.2d 1489 (11th Cir. 1989) (increased insurance cost is not a factor that would exempt an employer from compliance with the ADEA); *see also* 29 C.F.R. § 1625.7(f) ("A differentiation

based on the average cost of employing older employees as a group is unlawful, except for certain employee benefit plans.). A possible common ground would be to allow an older worker to compete equally for the job at the lower wage rate, rather than terminating her. See *Abbott v. Federal Forge, Inc.*, 912 F.2d 867 (6th Cir. 1990).

- G. Early retirement/severance packages. Employers are not precluded from presenting older employees with attractive early retirement offers creating a strong incentive to retire. An early retirement option can constitute constructive discharge only if the employee shows that the offer sufficiently alters the status quo such that each choice facing the employee makes her worse off. *Christopher v. Mobile Oil Corp.*, 950 F.2d 1209 (5th Cir.1992); *Mitchell v. Mobile Oil Corp.*, 896 F.2d 463 (10th Cir. 1990). Similarly, there is nothing which precludes an employer from taking into consideration age or length of service when formulating a severance package so long as those considerations did not serve as the basis for the employment decision. See *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510 (6th Cir. 1991).
- H. Myth of the younger older worker. Some employers still are under the false belief that they can avoid liability under the ADEA by replacing an older worker with someone else in the protected age group. The mere fact that the younger employee is over 40, however, does not necessarily prevent an age claim. See *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S. Ct.1307 (1996) (a 56-year-old manager who was replaced by a substantially younger 40-year-old could maintain an ADEA claim so long as the plaintiff shows he was discriminated against because of his age). The obvious question in light of *O'Connor* is whether an employee can still survive summary judgment when her replacement is only 2-3 years younger. Based on later decisions, such a gap is probably insufficient to assist a plaintiff in establishing a *prima facie* case. See *Schiltz v. Burlington Northern R.R.*, 115 F.3d 1407 (8th Cir. 1997) (a five year gap is not significant); *Hartley v. Wisconsin Bell*, 124 F.3d 887 (7th Cir. 1997) (a ten year difference is substantial, but a six to seven year difference may not be enough); *but see Greene v. Safeway Stores*, 98 F.3d 554 (10th Cir. 1996) (reversing a grant of summary judgment to the defendant even though the replacement worker was five years older than the plaintiff).

## V. ADEA Defenses

The ADEA expressly provides for certain defenses to age discrimination claims. Aside from the defenses in the benefits context, the ADEA also provides that it shall not be unlawful to base an employment decision on age where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business. 29 U.S.C.S. § 623(f)(1). To establish a "BFOQ" defense, the employer has the burden of proving that (a) the age limit is reasonably necessary to the essence of the business, and either (b) that all or substantially all

individuals excluded from the job involved are in fact disqualified, or (c) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. *See* 29 C.F.R. § 1625.6. For instance, the BFOQ defense may apply where age is used as a proxy for other employment characteristics, such as public safety. *See Coupe v. Federal Express Corp.*, 121 F.3d 1022 (6th Cir. 1997) (defendant's reliance on rule prohibiting air cargo operator from utilizing services of pilot who turned 60 was a BFOQ -- safety goes to the core of an aircraft pilot's job performance). However, if the employer's objective in asserting the BFOQ defense is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with a less discriminatory impact. 29 C.F.R. § 1625.6.

Employers may also "take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age" (the "RFOA" defense). 29 U.S.C. § 623(f)(1). For instance, future potential at a company is a legitimate factor for decision-making, so long as it is not based on age. *See Furr v. Seagate Technology, Inc.*, 82 F.3d 980 (10th Cir. 1996) (future job potential is a RFOA that a company might legitimately consider in a RIF decision). There is no precise standard for determination as to the scope of the RFOA defense. Whether the defense is available is determined based on the facts and circumstances of each individual situation. 29 C.F.R. § 1625.7(b).