

Shilepsky O'Connell LLP

Proving Age Discrimination with Circumstantial Evidence

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Primer on Employment Law

Bad management, unkind management and even unfair management is not necessarily unlawful management.

To be unlawful, it must be unlawful in motive or in implementation.

Examples

Unlawful Motive:

- certain types of bias, e.g. age, race, etc.

Unlawful Implementation:

- in violation of the terms of a contract

Primer on Discrimination Law

The employee must prove:

1. Membership in protected class
2. Harm
3. Discriminatory animus
4. Causation - #3 caused #2

Example

1. Age 40 or over
2. Termination
3. Hostility toward older employees
4. Which caused the termination

Animus and causation are often proven by circumstantial evidence.

Primer on Evidence

1. Direct Evidence
2. Circumstantial Evidence

Neither carries more weight
than the other.

Examples

Direct Evidence:

“We want someone younger for the job.”

Circumstantial Evidence:

Job given to younger person, but is that enough? NO!

Primer on *McDonnell Douglas*

Employee:

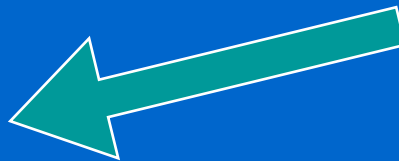
Employer:

Prima Facie Case



Legitimate Non-
Discriminatory
Reasons

Pretext for
Discrimination



Prima Facie Case

The employee creates an inference of discrimination by proving that s/he:

1. Is 40 or over;
2. Was performing acceptably;
3. Was terminated from employment;
4. In circumstances giving rise to inference of discrimination, e.g., replaced by younger person.

Legitimate Reasons

The employer defeats the inference of discrimination by proffering legitimate, non-discriminatory reasons for its actions.

Usually everything bad the employer can say about the employee.

Pretext for Discrimination

The employee revives the inference by proving that the employer's reasons are not the real reason, and that the real reason is discriminatory animus.

This is often the heart of the case.

The Darkened Room

- The terminated employee sits in the darkened room and says, “I am the victim of discrimination.”
- The employer shines its spot-lights on the employee’s warts and blemishes.
- The employee has to turn on the over-head lights in order to see what is going on.

Turning on the Over-Head Lights

The goal is to find evidence by which one can demonstrate that the reasons given are mere pretext for discrimination, often by proving that they are *false, implausible, inconsistent, incomprehensible and/or contradictory.*

Examples of what to look for:

1. Disparate treatment of similarly situated employees – use your own definition of similarly situated, not that provided by the company;
2. Divergence from prior practices and/or written policies; and
3. Patterns and practices of the employer regarding employees of certain ages, including statistical evidence narrowed to be relevant to your case.

Four Examples

What may be relevant differs from case to case but consider the following examples of circumstantial evidence that might help prove age discrimination in four different types of cases.

The Denial of Promotion

1. The person promoted was younger and less qualified;
2. The older employee was, essentially, doing the more challenging aspects of the new, young boss's job; and
3. The employer had a pattern and practice of not promoting people after they turned 55.

The RIF Termination

1. Despite the elimination of jobs, positions were found for younger people;
2. Younger employees were offered the opportunity to bump down to lower paying jobs;
3. As part of the RIF, succession planning was considered and assumptions were made about retirement ages; and
4. The average age for direct reports to this supervisor fell by 8 years.

The Performance Termination

1. The criticisms were misleading and even false;
2. Performance standards were applied more aggressively to the older employee;
3. Almost every new person hired by this manager was younger; and
4. Younger employees, unlike older colleagues, were given opportunities to learn new skills.

The Conduct Termination

1. The employer was looking for cause to terminate the older employee, e.g., by selectively reviewing his expense records;
2. The conduct had heretofore been common and tolerated; and
3. Younger employees who committed the same or worse offenses kept their jobs

Do I have a good case?

*You may not know
until you turn on the lights.*