A CASE STUDY: HANDLING AGE-RELATED ISSUES IN AN AGING WORKFORCE

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Paul W. Boehms
Daniel J. Bretz
Robert N. Dare
Maria F. Dwyer
Emory D. Moore Jr.
Anne-Marie V. Welch
Paul A. Wilhelm

CLARK HILL

MEET CHARLIE TIMKIN

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DISCUSSING RETIREMENT WITH EMPLOYEES

- Statutes do not prohibit employers from initiating discussions with employees concerning their retirement plans
- Discussions regarding retirement plans may be helpful to an employer for succession planning purposes
- Initiation of discussions concerning retirement plans, however, can be used as evidence of age discrimination
- Do not mention retirement in discharge meetings
- Best approach to discussing retirement with employees:
  - Initiate discussions regarding retirement only in the context of succession planning
  - Outside of the context of succession planning, pursue discussions regarding retirement only if the employee raises the issue

MANDATORY RETIREMENT AGE

- ADEA originally protected employees only up to age 65
  - Upper age limit was increased to age 70 in 1978
  - Upper age limit was eliminated in 1987
  - In Michigan, there is no minimum age for age discrimination
- The general rule against mandatory retirement age does not prohibit employers from discharging older workers

EXCEPTIONS TO THE GENERAL RULE AGAINST MANDATORY RETIREMENT AGES

- Exception 1 – Executives with high annual retirement benefits
- Employees who:
  - Are age 65 or older
  - Have been employed in a bona fide executive or high policy-making position for the two-year period immediately prior to retirement
  - Are entitled to an immediate, non-forfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan (or combination of such plans), which equals at least $44,000. 29 U.S.C. § 631(c).

MANDATORY RETIREMENT AGE (CONT.)

- Exception 2 – Employees in positions for which age is a bona fide occupational qualification

- Age may be a bona fide occupational qualification (BFOQ) for certain positions involving public safety (e.g. – airline pilots; firefighters; police officers)

  - The employer must demonstrate that its mandatory retirement policy is "reasonably necessary to the essence of the employer's business"

  - The employer must establish that it needs to rely on age as the determinative criterion for removing employees from the particular position, by showing either:

    - That the employer has a substantial basis for believing that all or nearly all employees above a particular age (e.g. – 55) lack the qualifications for the position

    - That it is highly impractical for the employer to individually test employees to determine whether each has the necessary qualifications

NEXT UP

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AGE DISCRIMINATION ISSUES IN SUCCESSION PLANNING

- Identifying and grooming successors for current leadership does not, by itself, violate the ADEA

- Employers have legitimate business reasons to gather information about how long employees intend to work, even though this may correlate with age. *Lee v. Rheem Mfg. Co*., 432 F.3d. 849 (8th Cir. 2005).

- Identifying specific persons or pools of candidates to be considered for management positions when those positions become vacant does not violate the ADEA, as long as the employer does not require or assume that potential replacements for retiring managers should be of any particular of age. *Misner v. Potter*, 2009 WL 1872598 (D. Utah 2009).

AGE DISCRIMINATION ISSUES IN SUCCESSION PLANNING (CONT.)

- In preparing succession plans, employers should not make age-based assumptions about employees' expected tenure. *Sharp v. Aker Plant Services Group, Inc*., 726 F.2d 789 (6th Cir. 2013).

ASKING AN EMPLOYEE ABOUT HIS/HER RETIREMENT PLANS

- In the context of succession planning, employers may ask employees about how long they intend to continue working. *Moore v. Eli Lilly & Co*., 990 F.2d 812 (5th Cir. 1993); *Colosi v. Electri-Flex Co*., 965 F.2d 500 (7th Cir. 1992).

- When asking an employee about his/her retirement plans, an employer should not refer to the employee's age

- Repeated or coercive inquiries about an employee's retirement plans may be evidence of age discrimination. *Greenberg v. Union Camp Corp*., 48 F.3d 22 (1st Cir. 1995).

- Employers should not respond negatively to worker statements that they intend to retire only in the distant future*. Lightfoot v. Union Carbide Corp*., 110 F.3d 898 (2d Cir. 1997).

GENERAL ADVICE RELATING TO SUCCESSION PLANNING

- Do not make age-based assumptions about a worker's retirement plans
- Consider candidates of all ages in the succession plan
- If you are asking workers about how long they intend to work, ask all workers in the same position and at all levels of seniority
- Do not make targeted inquiries to individual workers about their retirement plans, unless the worker has indicated that he or she is interested in retiring soon
- Do not make references to a worker's age, when asking the worker about retirement plans
- Do not express surprise or disappointment if the worker expresses an intention not to retire in the near future
- Do not ask a worker repeatedly or coercively regarding his/her retirement plans

CHARLIE'S NOT CUTTING IT ANYMORE

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AVOID PEJORATIVE REFERENCES TO AGE

- Do not use negative terms in reference to age (e.g. – dinosaur; gramps; ancient; fogie; old-timer; relic; etc.)
- Be careful about negative references that appear to be age-neutral, but that may be associated with age (e.g. – lack of energy; lack of enthusiasm; tired; no new ideas)
- Avoid age-related clichés (e.g. – “can’t teach an old dog new tricks;” “over-the-hill;” “his best days are behind him.”)
- Avoid age-related jokes (e.g. – “He’s so old that . . .”)

CUSTOMER PREFERENCE FOR YOUNGER WORKERS

- Employers may not limit an older worker's contact with or work for a customer, based on:
  - The employer's belief or knowledge that the customer prefers younger workers
  - The customer's discriminatory attitude toward older workers
  - The customer's stereotypical beliefs about older workers

CUSTOMER PREFERENCE FOR YOUNGER WORKERS (CONT.)

- Employers may limit an older worker's contact with or work for a customer based on legitimate, non-discriminatory business reasons, even if the reason has some connection with age
- Examples:
  - Higher fees for experienced workers
  - Not current with the market
  - Not current with technology
  - Unwillingness to work long hours

BIAS AGAINST INVESTING IN OLDER WORKERS

- Issue: May an employer lawfully refuse to "invest" in an older worker (e.g. – training; payment for education; attendance at seminars; introduction to customers)?

- Answer: An employer must have a legitimate, non-discriminatory business reason for treating older workers less favorably than younger workers

- Examples of legitimate, non-discriminatory business reasons for not "investing" in an older worker:

  - The worker indicates that he/she is not interested in the opportunity

  - The worker has no need for the "investment" for purposes of the worker's present or projected future career path

  - The worker advises the employer that the worker will be retiring or otherwise leaving the company

BIAS AGAINST INVESTING IN OLDER WORKERS (CONT.)

- Examples of discriminatory reasons for not "investing" in older workers:
  - The employer assumes that, because the worker is an older worker, the worker would not be interested in the opportunity
  - The employer assumes that the worker will be retiring in a few months or years, and the employer believes that the "investment" would be better spent on a younger worker

INACCURATE PERFORMANCE EVALUATIONS

- Inaccurate, favorable performance evaluations are a particular problem with older workers
- Reasons why evaluations of older workers sometimes are inflated:
  - Unwarranted deference to older workers in evaluations
  - "Why be critical? He won't be here much longer."
- Problem with inflated evaluations of older workers:
  - One thing that clearly has changed since that last glowing evaluation was that the worker has gotten older
  - Not preparing performance evaluations is better than preparing inaccurate performance evaluations

HE’S OUT TO GET ME!

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SHOULD YOU "BUILD A FILE?"

- Should you "build a file" against an underperforming older worker who has received inaccurate, favorable evaluations?
  - Often appears to be suspicious – "out to get" the worker
  - It is good, however, to document performance issues, even if the employer has not documented those issues previously
- If you do "build a file:"
  - Do not "nitpick" with criticisms
  - Negative comments/discipline should be for significant, verifiable transgressions
- It may be better to discharge a worker where his current conduct warrants discharge

EARLY RETIREMENT PROGRAMS – GENERAL

- An early retirement program (ERP) is a plan or program that provides workers who meet certain age or length of service criteria, with financial incentives to retire
- ERP's are permissible under the ADEA, if they are properly structured
- Requirements for valid early retirement programs:
  - They must be voluntary
  - They must be consistent with the purposes of the ADEA

EARLY RETIREMENT PROGRAMS – REQUIREMENT THAT PROGRAM BE VOLUNTARY

- The worker must be given sufficient time to consider his/her options
- The employer must provide accurate and complete information regarding the benefits available under the program
- The employer may not threaten, intimidate, or coerce workers into retiring
- The ultimate issue with regard to voluntariness is whether a reasonable person would have concluded that there was no choice but to accept the offer

EARLY RETIREMENT PROGRAMS – REQUIREMENT THAT PROGRAM BE "CONSISTENT WITH THE PURPOSES OF THE ADEA"

- Purposes of the ADEA:
  - Promote employment of older workers based on their abilities rather than age
  - Prohibit arbitrary age discrimination in employment
  - Help older workers find ways to overcome problems arising from the impact of age on employment

ADDITIONAL RULES RELATING TO EARLY RETIREMENT PROGRAMS

- An employer may lawfully limit facilities, divisions, departments, and positions that are eligible to participate in the ERP
- An employer may lawfully refuse applications to participate, even if the employee who applies falls within a category of employees to whom the program was offered
- An employer may lawfully limit participation in the program to workers who have attained a minimum age (e.g. – 55)

EXAMPLES OF EARLY RETIREMENT INCENTIVES

- Employees in ABC Company's Tubular Products Division who are age 50 and older will receive $1,000 times their years of service if they retire
- Salaried employees in the DEF Company's engineering department with 25 or more years of service will receive a $500 per month increase in their pension benefits if they retire
- All GHI Company production employees who have 20 or more years of service, or who are age 60 or older and have at least five years of service, will receive a $20,000 incentive if they retire

DON’T CALL ME SHIRLEY

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HANDLING PERFORMANCE OR BEHAVIORAL DECLINE RELATED TO AGE

- Employers have an obligation to accommodate disabilities, but not physical or mental decline that is not related to a disability
  - Advanced age is not a disability
  - Physical or mental decline associated with age is not a disability
- Employers may counsel, discipline, or discharge older workers for decreased or poor performance, even if that decreased performance is related to age
  - An employer, however, must treat older workers in the same manner as it treats younger workers with similar performance issues
- **But** – have some compassion in dealing with performance issues with older workers

YOU WANT ME TO DO WHAT?

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RIGHT TO MAKE MEDICAL INQUIRIES AND TO REQUIRE MEDICAL EXAMINATIONS

- The ADA does not require employers to guess or assume that an employee whose performance has declined or who is behaving erratically for unapparent reasons has a disability

- The ADA generally imposes, on the worker, an obligation to advise the employer of a disability that the worker has, if the worker wants an accommodation for that disability. 29 C.F.R. § 1630.9.

- In situations in which a worker's performance decline or erratic behavior appears to be related to a medical condition or disability, however, the employer may have an obligation to ask the worker whether he/she has any condition that is preventing the worker from performing the essential functions of his/her job

RIGHT TO MAKE MEDICAL INQUIRIES (CONT.)

- Aside from any potential obligation to inquire, an employer has the right to inquire about medical conditions if the medical inquiry is job-related and consistent with business necessity. 42 U.S.C. § 12112(d)(4)(A).
  - A medical inquiry is job-related and consistent with business necessity when the employer has a reasonable belief, based on objective evidence, that either: (1) the employee's ability to perform the essential functions of the job will be impaired by a medical condition, or (2) the employee will pose a direct threat to the health or safety of himself/herself or others as a result of a medical condition. EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations Under the ADA, Q. 5 (2009).
- An employer has the right to require medical examinations that are job-related, consistent with business necessity, and limited to the specific medical condition that appears to be related to the job. 42 U.S.C. § 12112(d)(4)(A).

GOODBYE AND GOOD LUCK

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AN EMPLOYEE'S REFUSAL TO SUBMIT TO A MEDICAL EXAMINATION

- If a worker refuses an employer's request to submit to a medical examination that is job-related and consistent with business necessity, the employer may:
  - Discipline or discharge the employee for performance or behavioral problems, even if those problems relate to a disability that could have been identified in the medical examination
  - Refuse to provide disability accommodation, the need for which could have been determined in the medical examination

(EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examination Under the ADA, Q. 9 (2009))

OLDER WORKERS BENEFIT PROTECTION ACT (OWBPA) REQUIREMENTS IN SITUATIONS INVOLVING SINGLE DISCHARGE

- The agreement must be written in a manner calculated to be understood
- The agreement must refer to the ADEA
- The agreement may not waive rights or claims that arise after the agreement is signed
- The employer must provide consideration in addition to anything of value to which the worker is already entitled
- The employer must advise the worker in writing to consult with an attorney before signing the agreement
- The worker must be given a period of at least 21 days to consider the agreement
- The worker must be given a period of at least seven days after signing the agreement within which to revoke the agreement

29 U.S.C. § 626(f)

OWBPA REQUIREMENTS IN SITUATIONS INVOLVING MULTIPLE DISCHARGES (REDUCTION IN FORCE)

- All of the OWBPA requirements for a single discharge must be met, except:
  - Workers must be given 45 days, rather than 21 days, to consider the agreement before signing it
  - The employer must provide workers from whom age waivers are requested with the following information:
    - The class, unit, or group of individuals covered by the severance program
    - Any eligibility factors for participation in the program
    - The time limits applicable to the program
    - The job titles and ages of all individuals who are eligible or selected for the program
    - The ages of all persons in the same job classification or organizational unit who were not eligible or selected for the program

29 U.S.C. § 626(f)

INAPPLICABILITY OF OWBPA REQUIREMENTS TO NON-AGE EMPLOYMENT CLAIMS

- OWBPA applies only to age-related claims (both age discrimination and age-related retaliation)
- OWBPA does not apply to other types of employment-related claims

DEXTER SNODGRASS

CLARK HILL

ANALYSIS OF CHARLIE'S POTENTIAL AGE DISCRIMINATION CLAIM

- Some unfavorable facts:
  - Consistently good reviews
  - Presumption that a long-service employee is a good performer; otherwise, the Company would not have retained him for as long as it did
  - Jury expectation that a long service employee has "earned" right to leave on his own terms
  - Age-related references to Charlie
  - CEO's insistence on Charlie's inclusion in succession plan, discussed in reference to Charlie's age
- Favorable Facts:
  - Evidence of actual performance problems
  - Counseling, although belated
  - Refusal to submit to medical examination

LIKELY OUTCOME OF CHARLIE'S CLAIM

- Summary judgment unlikely
- Jury trial too risky
- Case should be settled at mediation

THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

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