

eDiscovery Negotiation Training Employment Law Primer

The Sedona Conference



OVERVIEW OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

The Age Discrimination in Employment Act (“ADEA”) of 1967, 29 U.S.C. § 621, *et seq.*, is a federal law that prohibits employers and prospective employers from discriminating against qualified individuals who are 40 years of age, and older, based on their age.¹

Legislative intent

Congress found that the stereotype that older workers are less productive and competent than younger workers put older workers at a disadvantage in terms of keeping their jobs and getting other jobs after they became unemployed. It had also become common for employers to set arbitrary age limits for jobs that were unrelated to an individual’s ability to do the job successfully.

The purpose of the ADEA is to “promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.” 29 U.S.C. § 621.

Prohibited conduct

Examples of prohibited conduct include:

- refusing to hire a job applicant who is 40 or older based on the applicant’s age;
- discharging an employee who is 40 or older based on the employee’s age;
- discriminating against an employee who is 40 or older with respect to his compensation, or the terms and conditions of employment, because of the employee’s age;
- refusing to promote an employee who is 40 or older based on the employee’s age;
- demoting an employee who is 40 or older based on the employee’s age; and/or
- harassing, or retaliating against, an employee who is 40 or older because he has filed a complaint alleging age discrimination.

¹ The information in this document is not legal advice and should not be considered legal advice. It is offered for informational and educational uses only. It is not a comprehensive description of the ADEA, but, rather, an overview of portions of the ADEA that apply to the Capriotti/Pure Markets hypothetical. It is intended to clarify the types of information that relate to the claims and defenses in the hypothetical.

Burden-shifting analysis

The most common way of proving an age discrimination claim is through indirect evidence of discrimination, using the burden-shifting analysis set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

Under the *McDonnell Douglas* framework, the plaintiff must establish a *prima facie* case of age discrimination by a preponderance of the evidence. If he does that, the burden shifts to the employer, who must come forward with a legitimate non-discriminatory reason for its conduct. If the employer can rebut the employee's *prima facie* case by providing a legitimate non-discriminatory reason for its employment decision, the burden shifts back to the plaintiff to show that the non-discriminatory reason offered by the employer was a pretext for unlawful age discrimination.

Elements of a prima facie case

To establish a *prima facie* case, the plaintiff must establish that (1) she is over 40 years of age, (2) she is qualified for the job at issue, (3) she suffered an adverse employment action (such as a demotion or termination of her employment), and (4) she was replaced by a younger person.

Pretext

Pretext, generally, is a false reason given by an employer for an adverse employment action that is intended to hide the employer's true motives.

Examples of evidence that may demonstrate pretext include:

- false or contradictory reasons for the adverse employment action;
- implausible business justifications for the adverse employment action;
- changes in the employer's reasons or explanations for the adverse employment action;
- absence of documentation; or
- failure to follow company policy.

Defenses

The following are defenses that can be asserted by employers:

- The adverse employment action was taken due to a bona fide occupational qualification ("BFOQ") that is reasonably necessary to the operation of the employer's business
- The adverse employment action was based on reasonable factors other than age

Remedies

Potential remedies for violation of the ADEA include:

- injunctive relief;
- reinstatement;
- promotion;
- back pay;
- reasonable attorney's fees and costs; and/or
- liquidated damages for "willful" violation of the ADEA.