



Healthcare Industry Sees Increase In Age Discrimination Claims

Insights

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Lawyers and medical professionals have noticed a recent uptick in age discrimination claims in the healthcare industry. What is causing this increase? Is it simply a statistical fluke, or are there specific reasons the industry is seeing older workers becoming more litigious?

Overview Of ADEA And Recent Trends

Age discrimination involves an employer treating an applicant or employee less favorably because of their age. The federal Age Discrimination in Employment Act (ADEA) prohibits age discrimination in any aspect of employment – including hiring, firing, pay, job assignments, promotions, layoffs, training, and benefits – against those 40 years old or older. Many states have additional age discrimination laws, some of which provide a younger eligibility threshold for plaintiffs.

Just as with Title VII, the allegation most commonly asserted by ADEA claimants is of disparate treatment. For individuals to prevail when alleging such disparate treatment, they must produce to the court sufficient evidence of the employer's intent, or evidence that age actually played a role in the employer's decision-making process and had a determinative influence on the outcome. In 2009, the Supreme Court ruled that age discrimination plaintiffs bear the full burden of proving age was the deciding factor in their disciplinary action.

The ADEA turned 50 years old this year, yet shows no signs of irrelevancy; lawsuits based on alleged violations of the law are as popular as ever. In fact, age discrimination charges are steadily on the rise. From 1997 and 2007 there were generally between 16,000 and 19,000 such filings annually; since 2008, the number of complaints filed soared to 23,000 to 25,000 per year. According to the most recent statistics available, the Equal Employment Opportunity Commission (EEOC) reported a slight increase in age discrimination charges in 2016, rising to 22.8 percent of the total charges. The agency also noted that age claims brought in \$88.2 million in awards for successful claimants.

Healthcare Industry In The Crosshairs

As the population faces increasing numbers of older workers, the EEOC has placed age discrimination claims at the forefront of its agenda, and the healthcare industry is no exception to this trend. For example, in September 2016, the EEOC sued Montrose Memorial Hospital in Colorado, alleging widespread age discrimination. In the agency's accompanying press release, its motivation in prosecuting age discrimination claims was made abundantly clear: "Research shows that pervasive stereotypes about older workers still persist — for example, there are widespread stereotypes that older workers are less motivated, flexible or trusting and that a younger workforce

is preferable. These stereotypes are flatly untrue and must be recognized for what they are — prejudice and false assumptions.”

Specifically, the EEOC alleged the hospital discriminated against older nurses in favor of younger staffers. The EEOC pointed to a supervisor’s alleged comments, including statements that younger nurses “could dance around the older nurses,” and younger nurses are “easier to train” and “cheaper to employ.” The hospital responded to the lawsuit by releasing age demographics of its workforce; during the relevant time period, over 70 percent of the hospital’s workforce were aged 40 and above, showing that the employer provided ample opportunities for older workers.

The facts of this case are similar to the 2012 case brought by the EEOC against Hawaii Healthcare Professionals, Inc. In that case, a 54-year-old former employee was awarded almost \$200,000 in a default judgment after evidence showed the owner of the company made disparaging comments about her age prior to her termination.

And the EEOC is not alone; private plaintiffs across the nation are stepping up to file age discrimination claims against healthcare organizations. In November 2016, for example, three nurses filed such a lawsuit against their former employer, Prime Healthcare Services, Inc., in a New Jersey court. The plaintiffs were all longtime employees, each with 27 to 37 years of service, who alleged they were discriminated against and fired because of their ages. As evidence for their claim they cited disparaging statements allegedly made by managers.

In another recently filed case, a federal court in Indiana decided in April to grant permission to a 53-year old former pharmaceutical sales representative for UTC Laboratories, LLC to take her ADEA case to trial. The plaintiff’s manager allegedly expressed his preference for younger female sales representatives, and the court held that a reasonable jury could find the employer’s stated justification for termination – her alleged poor performance– was actually a pretext for age discrimination.

Statistics May Reveal Obvious Reason For Trend

The trend toward more litigious age claimants is likely due the changing makeup of our national population. While now eclipsed by Millennials in terms of population size, Baby Boomers still number over 75 million people in America. According to the most recent U.S. Census, Baby Boomers (defined as those born between 1946 and 1964) make up about a third of the workforce. The oldest Baby Boomers are now into their 70s, while the youngest are in their mid-50s. By 2030, about one in five Americans will be older than 65.

The 2016 Population Reference Bureau Report projects that in five years, the percentage of women aged 65 and older will increase from 15 percent to 20 percent of the workforce, and for men the numbers will increase from 23 percent to 27 percent. Further, average life expectancy in the U.S. has increased to 79 years. Perhaps even more surprising, is that in the next 40 years the population of Americans aged 65 and older will more than double. These statistics reveal a possible correlation

between a changing population and the drastic increase in age discrimination claims in the healthcare industry.

Preventive Action Is Key

It's not all bad news for employers on the age discrimination front. Recently, the 11th Circuit Court of Appeals ruled in favor of R.J. Reynolds Tobacco Company, holding that the ADEA does not apply to job applicants, but only to employees. Therefore, if you have operations in Alabama, Florida, or Georgia, applicants may not be legally permitted to bring ADEA claims, potentially cutting down on the number of age discrimination claims for your company.

In June, the 5th Circuit confirmed a pretrial victory for Singing River Health System, finding that a 65-year-old former employee was terminated not because of her age, but because of a reduction in force. The evidence even showed that the company delayed the plaintiff's termination so she could earn retirements benefits, helping to demonstrate the company did not harbor any age-related animus towards her.

To secure an outcome similar to the ones earned by Singing River and R.J. Reynolds, or to avoid becoming embroiled in age discrimination litigation altogether, you should examine the treatment of employees of all ages in your organization. Before disciplining an employee over the age of 40 for misconduct, review how younger employees who engaged in similar misconduct have been disciplined in the past. Also, it is important to effectively document all employees' poor performance and policy violations; regardless of age, employees need to abide by your rules. Finally, make sure you train your managers to avoid making any age-related comments. As noted above, these comments can come back to haunt you in the midst of an age discrimination claim.

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