

Employment Law Seminars

2005-2006

Dealing with Multi-Generational Workplace Issues

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Lynnwood, WA 98402

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Dealing With Multi-Generational Workforces

by

Mike Reynvaan, Kristina Moris, J. Tucker Miller

I. Federal & State Law Governing Age Discrimination

A. The Age Discrimination in Employment Act ("ADEA")

The ADEA is a prohibition against the adverse treatment of an individual "because of such individual's age." See 29 U.S.C. §§ 621-634.

The ADEA does not protect everyone against age discrimination. *The prohibition applies only to persons who are at least 40 years old.* 29 U.S.C. § 631.

- It is not illegal for an employer to discriminate against people *under* the age of 40. See *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004).
- Within the protected class (40+) it is illegal for the employer to favor a younger person over an older one. See *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996).
- Within the protected class (40+) age is an impermissible criterion, regardless of whether it is being used to disadvantage someone within the class and favor another who is older (and also within the class). See *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308.

The ADEA applies to employers with twenty or more employees, their agents, labor unions, employment agencies, and state agencies and political subdivisions. 29 U.S.C. § 630(b).

The ADEA protects employees, applicants for employment, and retirees, if the alleged discrimination is related to or arises out of the employment relationship. 29 U.S.C. § 623(a)(1).

The ADEA does permit an employer to make an employment decision based on age when it is a *bona fide* occupational requirement. 29 U.S.C. § 623(f).

B. The Washington Law Against Discrimination ("WLAD")

The WLAD prohibits an employer from discriminating against an individual on the basis of age. The prohibition, like the ADEA, applies to individuals who are at least 40 of age. RCW 49.44.090.

The prohibition on age discrimination, under state law, applies to **all employers, regardless of their size**. *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990).

The WLAD, like the ADEA, permits employers to make an employment decision based on age if it is a *bona fide* occupational requirement. RCW 49.60.180.

Under the WLAD, unlike the ADEA, it is not illegal for an employer to discriminate between members within the protected class. See *Kirby v. City of Tacoma*, 124 Wn. App. 454, 98 P.3d 827 (2004) ("[T]o establish a successful claim of wrongful discharge due to age discrimination . . . the replacement must be someone not in the protected class.").

C. Recent Legislative Developments Highlight the Emerging Multigenerational Workforce

On November 17, 2005 the Senate Commerce Panel approved S. 65 a bill permitting commercial pilots, with some restrictions, to fly until the age of 65. The bill allows pilots over the age of 60 to continue to fly until they are 65, on multi-crew aircraft where there is a co-pilot who has not yet reached the age of 60. The bill mirrors the policy of several other countries who also permit their pilots to fly until the age of 65. The bill also overturns an FAA policy that has been in place since 1959, that requires pilots to stop flying once they reach their 60th birthday. While the FAA contended that the rule recognized the increased risk of health problems that could impact a pilot's ability to fly; those supporting a lifting of the ban countered that there was no evidence that pilots over the age of 60 are any less safe than their younger counterparts. Supporters of the measure include Southwest Airlines and JetBlue Airways. The airline pilot's union, however, is sharply divided over the issue. The U.S. Supreme Court recently denied a petition for review of the legality of FAA's age-60 rule. Denial of the petition let stand a recent District of Columbia Court of Appeals decision in *Professional Pilots Fed'n v. FAA*, 74 FEP Cases 345. The decision of a divided court found that the FAA's age-60 rule did not violate the Age Discrimination in Employment Act.

D. Prohibited Practices Under the ADEA & WLAD

The ADEA generally bans any advertisements indicating age preference. 29 U.S.C. § 623(e); RCW 49.44.090(2).

An advertisement may inform applicants that they must state their age as a part of their application, but such a provision is subject to strict scrutiny because of its potential to deter older workers from applying for employment. Any request by an employer for an applicant's date-of-birth must be accompanied by a statement that the inquiry is not for an improper purpose by pointing to the ADEA and advising that it bans discrimination against those in the protected group. 29 C.F.R. § 1625.4; RCW 49.44.090.

Under the ADEA an employer may not discriminate based on age in providing all forms of employee benefits, including those provided under a *bona fide* employee benefit plan. An employer must provide older workers with benefits at least equal to those provided to younger workers, unless it can be proven that the cost of doing so is significantly greater for the older workers. 29 U.S.C. § 623(f)(2), (630)(l); 29 C.F.R. § 1625.10.

Discharging an employee to keep the employee's pension benefits from vesting is not, in and of itself, a violation of the ADEA so long as the vesting provision speaks in terms of length of service, rather than age. However, an employer may face liability under ERISA for engaging in such an employment practice. *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993).

The ADEA does not prohibit an employer from favoring older workers over younger workers. *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004).

E. Descriptive Phrases that Can't Be Used in Advertising:

Under EEOC interpretive guidelines, the following descriptive phrases should not be used in employment advertisements:

"Young," "College Student," "Recent College Graduate," "Boy," or "Girl" cannot be used because they discourage older workers from applying for employment.

"Age 40 to 50," "Age Over 65," "Retired Person," or "Supplement Your Pension" cannot be used because they discriminate against members of the protected class.

29 C.F.R. § 1625.4; WAC 162.16.260

F. Permissible Practices Under the ADEA & WLAD

An employer is permitted to make employment decisions "based on reasonable factors other than age" ("RFOTA"). 29 U.S.C. § 623 (f)(1); 29 C.F.R. § 1625.7

The RFOTA defense is typically asserted in cases where an employee was discharged as a part of a reduction in force ("RIF"). This defense is generally successful where the employer can show that the procedures employed during the RIF, selected employees based on performance rather than age. *Coleman v. Quaker Oats Co.*, 232 F.3d 1271 (9th Cir. 2001); Larson, *Employment Discrimination* (Matthew Bender & Co. 2005) § 132.03

Age may be a permissible criterion when it is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business" ("BFOQ"), or when the employer "observe[s] the terms of a bona fide seniority system" or "a bona fide employee benefit plan." No seniority system or retirement plan, however, may require or permit the involuntary retirement of a covered individual because of his or her age. 29 U.S.C. § 623(f); RCW 49.60.180.

An employer asserting a BFOQ defense must prove: (1) the age limit is reasonably necessary for the essence of the business; and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified; or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. 29 C.F.R. § 1625.6, *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985) Under the WLAD, the BFOQ defense is narrowly construed. WAC 162-16-240

G. A Special Note for Public Employers

The ADEA as originally drafted did not cover local government entities. However, a 1974 amendment, applied the ADEA's prohibitions to state and local governments. The Supreme Court, in 1983, held that the ADEA applied to state law enforcement officers, and required that age restrictions meet the BFOQ standard. In 1986, Congress amended the ADEA to provide an exception for local police officers and firefighters. That amendment lapsed in 1993, but was renewed in 1996.

In *Feldman v. Nassau County*, ___ F.3d ___, 2006 WL 40815 (2d Cir. Jan. 9, 2006) the court considered the claim of a 49-year-old who applied to take the Nassau County civil service exam to become a police officer. His application was denied under a New York law requiring applicants for the police department be under 35 years old. Feldman contended that the civil service law was a subterfuge. He pointed to an experiment the state conducted on lifting the age restriction that concluded "older officers leave the force at a higher rate than young officers and utilize more sick leave. With per officer training costs calculated at an estimated \$100,000, officer long term retention becomes an economic issue for the state." The court found it "difficult to imagine *any* legislation on social or labor concerns that is wholly divorced from budgetary or fiscal considerations."

II. Making the Case for Age Discrimination

A. The Prima Facie Case

To succeed on a claim of age discrimination, the employee must prove:

- (1) That she is a member of the protected class (40+);
- (2) That she was adversely affected by an employer's employment action; and
- (3) That the employer took such action because of the plaintiff's age.

B. Adverse Employment Action

Under the WLAD, an employee must show that his employer took some "adverse employment action" against her. It must be "an actual adverse employment action, such as a demotion or adverse transfer, or a hostile work environment that amounts to adverse employment action." See *Kirby v. City of Tacoma*, 124 Wn. App. 454, 98 P.3d 827 (2004).

Federal law defines as an adverse employment action as an action involving a change in employment conditions that is more than an "inconvenience or alteration of job responsibilities," such as reducing an employee's workload and pay. See *DeGuiseppe v. Village of Bellwood*, 68 F.3d 187 (7th Cir. 1995); *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000).

An adverse employment action includes: Discharge; Demotion accompanied by decreased wages or salary, a less distinguished job title, a material loss of benefits, significantly diminished material job responsibilities, or loss of seniority; an Adverse transfer; or Denial of a promotion.

Adverse employment action likely does not include: threatening to fire an employee; yelling at the employee; or an employee's loss of overtime pay eligibility.

B. Direct v. Circumstantial Evidence

An employee can prove the employer's intent to discriminate under the ADEA through either direct or circumstantial evidence.

Direct evidence is evidence of conduct or statements by persons involved in the decision-making process that may be viewed as directly reflecting the alleged discriminatory attitude sufficient to permit the fact finder to infer that that attitude was more likely than not a motivating factor in the employer's decision. *Enlow v. Salem-Keizer Yellow Cab Co.*, 371 F.3d 645 (9th Cir. 2000).

One way an employee can show direct evidence of bias is through statements (or other evidence) made by their employer. See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); see also *Aragon v. Republic Silver State Disposal Inc.*, 292 F.3d 654 (9th Cir. 2002)

Factors that are considered in evaluating whether statements are direct evidence of bias, include:

- Ambiguity or lack thereof in the statement; *Mukhtar v. California State University, Hayward*, 299 F.3d 1053 (9th Cir. 2003);

- Intensity of the bias shown by the statement; *Kang v. U. Lim America, Inc.*, 296 F.3d 810 (9th Cir. 2002);
- Time elapsed between statement and adverse employment action; *Peters v. Renaissance Hotel Operating Co.*, 307 F.3d 535 (7th Cir. 2002);
- Frequency of the statements;
- Whether statement was made by someone with ability to take employment actions; *Bergene v. Salt River Project Agricultural Improvement & Power District*, 272 F.3d 1136 (9th Cir. 2001); and
- The employer's response to the statements.

Standards for admitting statements vary depending on their impact on the case. If the statement is offered to prove a mixed-motive on the part of the employer (thereby shifting the burden to the defendant) then the standard is very high. If, however, the statement is offered as evidence of pretext, the standard is lower.

So called "stray remarks," while not admissible to prove a mixed motive analysis, may be admissible to show pretext.

Where an employee seeks to prove their claim using circumstantial evidence, then the *McDonnell Douglas* burden shifting analysis is employed. Under this analysis the employee must first make out a prima facie case of age discrimination. The burden then shifts to the employer to offer a legitimate non-discriminatory reason for its employment decision. Once the employer has made such a showing, the burden then shifts back to the employee to show that the proffered reason was pretextual. The prima facie case, using circumstantial evidence, requires the plaintiff to show:

She was a member of the protected class (40+);

She was performing the job satisfactorily;

She was discharged or suffered some other adverse employment action; and

She was replaced by a substantially younger employee with equal or inferior qualifications. Note, that the substantially younger individual need not be from outside the protected class.

Where the age discrimination claim arises from an RIF, the employee does not have to show that she was replaced by a younger worker. But the employee must generally show that the employer had a continuing need her skills (i.e. her job is still being performed), or by showing that others not within the protected class were treated more favorably. *Coleman v. Quaker Oats Co.*, 232 F.3d 1271 (9th Cir. 2001)

An employee can demonstrate pretext in two ways: (1) indirectly, by showing that the employer's proffered reason is internally inconsistent or otherwise not believable; or (2) directly, by showing that unlawful discrimination more than likely motivated the employer. See *Kirby v. City of Tacoma*, 124 Wn. App. 454, 98 P.3d 827 (2004).

C. Case Examples

1. Baker v. American Airlines

In *Baker v. American Airlines*, 430 F.3d 750 (5th Cir. 2005) the court affirmed the principle that the employee carries the burden of proving pretext. Baker filed suit against her employer, American Airlines, for age discrimination, retaliation, and other employment related claims. The lower court granted summary judgment in favor of the employer on all of Baker's claims. The court followed the basic burden shifting analysis applicable in any age discrimination case based on circumstantial evidence. In this case, Baker, relied on American's answer to establish that American had discharged her while retaining other younger employees. American, however, offered a legitimate reason for its employment action – a ten percent, across the board, reduction in force. Baker then attempted to shift the burden back onto American to prove that the reduction in force was not a mere pretext. The court, reinforced the fact that plaintiff has the burden of proof on pretext. Here, Baker made no showing of pretext, and therefore could not meet her burden.

2. Whittington v. Nordam Group

In *Whittington v. Nordam Group*, 429 F.3d 986 (10th Cir. 2005) the court considered the claim of a 62 year-old production supervisor who was discharged in reduction in force ("RIF"). Whittington, the oldest employee selected in the RIF, was discharged because his position as supervisor had been previously eliminated. In fact, Whittington was one of two supervisors (including a 57 year-old departmental lead) in his group. Nordam, however, had only discharged two supervisors in the prior eight years; both for "their failings as employees." In addition, Nordam conceded at trial that Whittington had no "blots" on his performance record, and was the only employee with an "outstanding" rating on the termination list. Whittington's former supervisor also testified that Whittington had the skills necessary to be a supervisor. Moreover, there was conflicting testimony both as to who, and how, Whittington was selected for discharge. Nordam argued, on appeal from a grant of summary judgment, for a bright-line rule that a five-year difference in age was insignificant as a matter of law in an age discrimination cases. Nordam relied on the U.S. Supreme Court's decision in *O'Connor* for the proposition that there cannot be an inference of age discrimination when the plaintiff is insignificantly older than the similarly situated employees who received better treatment. The court, however, found Nordam's argument misplaced for two reasons. First, Nordam assumed that Overbey (the other lead) was the only employee against whom Whittington should be compared. But, the court found instead, that Whittington was properly compared to all nine leads in his division. That comparison involved not only the 57-year-old Overbey, but also the youngest of the division's leads who was 28-years-old. Second, even if Overbey were the only comparator, the court found that the five year difference was not dispositive. Rather, it was a factor, among others, to be considered. Based on those reasons, the court upheld the jury verdict in favor of Whittington. **Note** – Courts are not uniform on this issue. Some courts have found a five year difference to be insignificant. See *Bennington v. Caterpillar, Inc.*, 275 F.3d 654 (7th Cir. 2001). Others have suggested that a 10 year difference while not insignificant in a particular case, could be insignificant in another case. See *EEOC v. Board of Regents of University of Wisconsin System*, 288 F.3d 296 (7th Cir. 2002).

3. **Baqir v. Principi**

In *Baqir v. Principi*, ___ F.3d ___, 2006 WL 146111 (4th Cir. Jan. 20, 2006), the court considered the claim of a doctor who was hired by a VA hospital. Baqir was hired to independently perform specialized duties as the only interventional cardiologist at a VA hospital. His employment was conditioned on the completion of a credentialing process and approval by the hospital's director. Following his hire and a review of his file, the hospital determined that Baqir's qualifications were overstated. As such, they granted him privileges only for basic procedures, and required that he complete certain proctoring and an assessment of his skills by another facility. Baqir's performance was observed by several doctors who unanimously agreed that he was not ready to perform the full functions of an interventional cardiologist. The hospital then held a meeting wherein it decided not to credential Baqir as an interventional cardiologist, to report this fact to a national practitioner database, and terminate Baqir's employment. Following this meeting, one of the participants spoke with Baqir's wife, who was also a cardiologist. She recalled the individual telling her that Baqir was being terminated because of his age, and that interventional cardiology was a young man's game. The individual making the statements alleged that he was merely suggesting that Baqir was not qualified for interventional cardiology, and should pursue a different specialty. Baqir was terminated, and filed suit against the hospital alleging, in part, age discrimination. Baqir was 53 years-old when he was terminated. The court of appeals, reviewing a grant of summary judgment in favor of the hospital, found that even accepting the allegedly ageist statements made by the hospital as true, Baqir could not maintain his claim of age discrimination. The court did find that the statements made by a single participant at the meeting regarding Baqir, could be attributed to the ultimate decision-maker who participated as a non-voting member in the meeting. However, even though age was a motivating factor in the hospital's decision; the hospital could avoid liability where it showed that it would have made the same decision in the absence of a discriminatory motive. Here, the hospital discharged Baqir because he could not perform the essential duties of his job.

4. **Browning v. Department of the Army**

In *Browning v. Department of the Army*, ___ F.3d ___, 2006 WL 126800 (6th Cir. Jan. 19, 2006), the court considered the claims of a 48-year-old Material Handler and Supervisor who was denied a position as an Explosives and Handler Supervisor. Browning and five other candidates applied for the position when it was announced. Courtney, a supervisor with the department listing the open position, created a matrix by which to rank the candidates. His matrix was based on the job description associated with the position. Because Courtney had supervised each of the six applicants he neither conducted interviews of the position, nor did he review the employees' personnel files. Courtney assigned points to each applicant based on the criteria he included in the matrix. He assigned points only for applicants who demonstrated outstanding capacity in a particular category. After points were assigned and totaled he ranked the candidates. Browning was ranked third. Courtney offered the position to the number one candidate, and he accepted the job. Browning then filed suit alleging that the matrix was merely a pretext for age discrimination in the hiring decision. The lower court granted summary judgment in favor of the Army. The court of appeals affirmed the grant of summary judgment, and found that the matrix used in this case was not a pretext for age discrimination. Browning argued that the job description for the position only valued administrative/managerial experience at 13%, while the matrix used by Courtney valued it at 20%. The court, however, found that "Courtney's decision to weight

administrative/managerial experience more heavily than the job description suggested is simply not sufficient to demonstrate pretext." In addition, the fact that the matrix scores were susceptible to subjective determinations was also not sufficient to demonstrate pretext. Browning also argued that he should have been awarded additional points within certain categories, given his experience. The court noted, however, that "the law does not require employers to make perfect decisions, nor forbid them from making decisions that others may disagree with. Rather, employers may not hire, fire, or promote for impermissible, discriminatory reasons."

D. The Same Actor Defense

Some courts have held that if the same individual responsible for hiring an individual, is also responsible for firing the individual, then it is less likely that there was bias against the employee. This is especially the case where the decisions to hire and discharge are made within a relatively short period of time. See *Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267 (9th Cir. 1996). Some courts, however, have also rejected such a proposition. See *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564 (6th Cir. 2003) (en banc).

E. Steps Employers Can Take to Protect Themselves From Age Discrimination Cases

Keep Detailed Records of Employee Performance and Disciplinary Action

Make Performance Appraisals Objective

Have Supervisors Document Performance Problems As They Occur

Effectively Communicate Performance Problems to Employees

Do Not Pressure Older Workers to Retire or Quit

Counsel Older Employees on the Advantages and Disadvantages of Employment, BUT Let Them Make Up Their Own Mind

III. Hostile Work Environment and Age

Few courts have expressly decided whether a hostile work environment can be maintained under the ADEA. However, many courts have presumed that such claims are viable, and have analyzed such claims under the standards normally applied to other hostile work environment claims. The EEOC, in Enforcement Guidance 915.002, has stated that the standards applied to allegations of sex based hostile work environment also apply to claims of hostile work environment based on age.

A. Definition of Harassment

Harassment which is sufficiently severe or pervasive so as to alter the conditions of the employee's employment, creating an abusive working environment.

To be actionable, hostile environment harassment must be sufficiently severe or pervasive to "alter the conditions of [the victim's] employment and create an abusive working environment."

In a hostile environment claim, the plaintiff generally must prove more than a few isolated incidents and cannot rely solely on "casual comments or trivial events and sporadic conversation."

The Ninth U.S. Circuit Court of Appeals has recognized that a hostile work environment claim may be predicated on age. In *Sischo-Nownejad v. Merced Community College District*, 934 F.2d 1104 (9th Cir. 1991), the court noted that a plaintiff may show a violation of Title VII and the ADEA "by proving the existence of a hostile work environment. . . . A hostile work environment requires the existence of severe or pervasive and unwelcome verbal or physical harassment because of a plaintiff's membership in a protected class." In *Sischo* the plaintiff only made claims of disparate treatment based on age. Nevertheless, the court recognized that age could be the basis for a hostile work environment claim.

B. Case Example:

1. Rivera-Rodriguez v. Frito Lay Snacks Caribbean

In *Rivera-Rodriguez v. Frito Lay Snacks Caribbean*, 265 F.3d 15 (1st Cir. 2001), the court noted that "[h]ostile work environment claims were first recognized in the sex-discrimination context, but have since been recognized for members of any protected class." In September 1985, Rivera became Frito Lay's Director of Human Resources for the Caribbean. In 1993 Frito Lay's Puerto Rican operations moved under Pepsico's Latin American region, headquartered in Mexico. Following this reorganization Frito Lay's employees filed a petition to unionize. Rivera worked with other members of the company to discourage unionization. Rivera's efforts, however, were unsuccessful. Following unionization, Rivera was told that his position was being eliminated and his duties were transferred to a younger employee. Rivera was relocated to another market, where his position was again eliminated. Frito Lay offered him a position as a human resources consultant, which Rivera declined. He was subsequently terminated. Rivera then filed suit against Frito Lay alleging a hostile work environment based, in part, on age. The court of appeals, reviewing a grant of summary judgment in favor of Frito Lay, found, as a threshold matter, that the seven year age difference between Rivera and the employee who took over his responsibilities, was sufficient to support a *prima facie* case of age discrimination. The court then found that several comments made by Rivera's supervisors relating to Rivera's age were sufficiently anchored to Rivera's claims and were also sufficiently numerous to be considered systematic and continuous. In addition, the court found statements about a need for youthful blood, a desire to retire workers over the age of 50, and repeated comments about Rivera's age, were all sufficiently severe and pervasive such that they created an objectively hostile work environment that was subjectively perceived by Rivera as abusive. The court concluded that a reasonable jury, given the totality of the circumstances, could find that Rivera was subjected to a hostile work environment based on his age.

IV. Retirees and Age Discrimination

A. Rehiring Retirees

Some recent cases have highlighted the court's consideration of the claims of retirees who have sought re-employment with their former employers.

B. Case Examples:

1. Lee v. Rheem Manufacturing Company

In *Lee v. Rheem Manufacturing Company*, 432 F.3d 849 (8th Cir. 2005) the court considered an age discrimination claim made by a retired employee who alleged that his former employer hired a younger employee over him because of age. Lee was a former Human Resources Manager with Rheem. He retired from his job in 1999 and elected to take his pension and profit-sharing benefits in a lump sum. He subsequently lost a large portion of that money in poor investments. After Lee retired, relations between Rheem and the union representing its workers soured, and grew worse with time. Three years after Lee's retirement a labor relations position with Rheem's human resources department became available. Lee applied for the position, but was ultimately not picked to fill the vacancy. Lee filed suit against Rheem, alleging that Rheem had picked a younger employee over him because of Lee's age. Rheem, however, denied this claim. Instead, Rheem stated that it had not hired Lee because he was not interested in a career with Rheem, was not interested in promotion at Rheem, and out of concerns over Lee's health. As far as Rheem was concerned, Lee only wanted a short-term position to make up for the losses he incurred from poor investments. The district court granted summary judgment in favor of Rheem. The circuit court upheld summary judgment in this matter, and reasoned that Lee had offered neither direct, nor circumstantial evidence of age discrimination. Rather, Rheem had offered a legitimate non-discriminatory reason for not hiring Lee, and Lee could not provide evidence that Rheem's reason was pretextual. Lee argued on appeal that he had provided both direct and circumstantial evidence of age discrimination by Rheem. As direct evidence, he pointed to statements made during his interview inquiring about the amount of time he intended to work. In addition, Lee pointed to statements about "new processes" or how "things have changed a lot." The court held these statements to be statements of business concerns, not evidence of age discrimination. As for circumstantial evidence, Lee pointed to the company's concerns about his health, the length of time he intended to work, and his lack of desire to be promoted. The court, however, addressed each of these arguments in turn, and noted that they too represented legitimate business concerns on the part of Rheem. As such, the court affirmed the lower court's grant of summary judgment in favor of the employer.

2. Rivera Rodriguez v. Sears Roebuck De Puerto Rico, Inc.

Retired employees are not necessarily entitled to any special treatment when they seek reemployment with their former employers. In *Rivera Rodriguez v. Sears Roebuck De Puerto Rico, Inc.*, 432 F.3d 379 (1st Cir. 2005), the court considered the claims of a retired employee who applied for re-employment with Sears on two separate occasions. Rivera worked for Sears from 1964 until her voluntary retirement in 1998. She retired from the company following her unsuccessful bid for a Buyer position in 1997. When she announced her retirement, various Sears personnel, including managers and human resources, tried to talk her out of her decision. Two years after her retirement, Rivera, then age 57, learned of an opening from a friend. Rivera contacted Sears about the opening, but never received a response. The opening, for a District Merchant, was posted internally, and ultimately a candidate was hired from within in November of 2000. By the time Rivera sent a letter of interest for the position, in December 2000, the position had been filled. Rivera subsequently filed suit against Sears claiming age discrimination in their decision not to hire her for the position. In 2002, after Rivera filed her law suit, she learned of another open position at Sears. The opening was for a Buyer, the position

that Rivera had earlier been denied for lack of qualifications. Rivera applied, but was again denied the position because Sears believed her to be unqualified. Rivera filed a second suit alleging age discrimination, and retaliation for her having filed her first suit. The lower court awarded summary judgment in favor of Sears. In upholding summary judgment, the First Circuit Court of Appeals found that River could not sustain either of her claims of age discrimination. As to the first claim, the court noted that Sears' policy of hiring internal candidates evidenced no discriminatory motive. Moreover, Rivera's claim that as a retired employee she should be afforded the same treatment as an internal candidate was without merit. In fact, Sears' employee policies only provided that a retired employee was eligible for rehire if they had a satisfactory work record. Sears also presented evidence that they had a hiring freeze in place at the time they were interviewing for the District Merchant position. The court noted that the testimony of several Sears employees about the hiring freeze would normally not be sufficient. This was especially so where Sears was a large company with detailed employment practices and guidelines. Indeed, the absence of documentation of the hiring freeze in such a case militates against testimonial evidence to the contrary. Nevertheless, where Sears had already hired an internal candidate before Rivera had even applied for the position, Rivera could not make a showing of age discrimination. The court also reviewed River's claim with respect to her second application for re-employment as a Buyer. The court again found that Rivera could not sustain a claim of age discrimination where she had applied for the position five years prior and been found unqualified. The fact that she was denied for the same position five years later on the same grounds did not evidence any age discrimination on Sears' part. Rivera, however, also pointed to statements made by a vice president at Sears that Sears' president preferred to work with younger people. However, where the individual in question was no longer the president at the time the hiring decision was made, and did not participate in the hiring decision; Rivera could not maintain her claim of age discrimination.

C. Retiree Benefits

1. Cole v. Arvinmeritor

In *Cole v. Arvinmeritor*, Case No. 03-73872 (E.D. Mich. Dec. 22, 2005) a federal district court recently issued a preliminary injunction enjoining Arvinmeritor from eliminating health benefits for approximately 2,900 retirees and their eligible dependents and surviving spouses. The plaintiffs relied on language from their collective bargaining agreement ("CBA") that had been unchanged for five decades, and provided for health benefits for retirees, their dependents and surviving spouses. The court found that the retirees were likely to succeed on their claims under the Labor Management Relations Act and the Employee Retirement Income Security Act to enforce the terms of the CBA. The lawsuit was prompted by changes made to the company's health plan in 2003 and 2005 when the company cancelled dental, hearing and vision coverage; increased co-payments, deductibles, and out-of-pocket maximums; and announced that it would eliminate retiree coverage as of January 1, 2006. The company took all of these actions without union approval.