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News

"Overqualified" or Age Discrimination? You Decide.

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by MARK T. BROTH

Lots of people have found themselves on the chopping block this past year as companies downsize to save money. That's made it an opportune time to shed some senior, more expensive staff. But at what point does a layoff become age discrimination?

That's a question a former plant manager may ask in this hypothetical situation. Born in 1948, he was drafted into the Army right after high school and spent two years on active duty. Upon returning to NH, he took his first full-time job, an entry-level position in a machine shop.

During the next 20 years, he stayed at that machine shop, got higher degrees, and received steady promotions and pay increases, eventually becoming plant manager in 2000. He had a good working relationship with the regional vice president, a 35-year-old MBA based in the same facility.

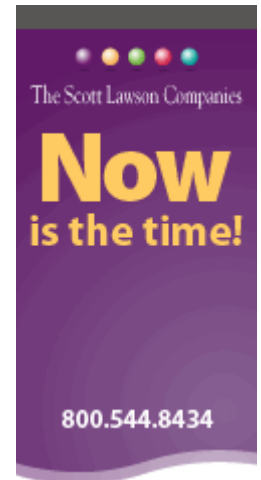
When customer orders and profits began declining in late 2008, the vice president offered to assume the plant manager role in addition to his regional role. It made sense on paper. After 41 years, the plant manager was terminated because his position was being eliminated.

The company offered severance pay in exchange for waiving his rights to pursue claims against the company. The waiver document expressly references the law prohibiting age discrimination and said he had a right to consult an attorney.

The Other Side of the Coin

What was the company thinking? His age was never a consideration in the job elimination decision. This was purely an exercise in efficiency, practicality and qualifications. While the vice president had the skills to perform the plant manager function, the plant manager had substantially more experience and expertise, but no MBA, a pre-requisite for the vice-president position. He also had not managed multiple facilities. Tough times require hard decisions, and this was one of those prudent and lawful, but difficult, decisions.

What was the employee thinking? He worked for a company with a culture of long-term employment and had every expectation he could work there until he retired in a few years provided he was healthy and productive. He had succeeded in every position he held, introduced innovations that created efficiencies and receive a stellar evaluation and modest pay increase at the end of 2008. The vice president? He wouldn't recognize a machine tool if he tripped over it, and can't read a shop blueprint. If any position was expendable, the vice president job was the obvious choice. And didn't the vice president say something recently about the plant manager having



This Afternoon:
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"too much gray hair to relate to the new employees" and often refer to him as "the silver fox?"

What did that waiver form say about age discrimination?

After consulting a lawyer, he brought a charge of age discrimination with the Equal Employment Opportunity Commission (EEOC) and NH Commission for Human Rights (HRC). Eighteen months later, the case is pending in federal district court, and the employer has spent \$100,000 so far, wiping out most of the savings realized by eliminating the plant manager position.

While the lawsuit is pending, the plant manager continues looking for a comparable position. A long-term competitor had advertised a position for a production engineer, a position he held 10 years ago, but the job went to a younger candidate. The same thing occurred when he applied for a sales position. Both potential employers told him he was "overqualified," even though he was willing to take a significant pay cut. He is now considering whether to bring claims for age discrimination in hiring.

What does it mean? This scenario is not real, but a composite of scenarios that can lead to age discrimination claims. It does demonstrate everyday personnel practices that can place an employer at risk.

Even in a good economy, older workers are at a disadvantage in competing for jobs. As a result, a displaced older worker is likely to have a longer period of unemployment or underemployment. The resulting financial pressures, together with the blow to self-esteem, increase the likelihood older workers will decide an employer unlawfully considered age when employment is terminated or they were turned down for new jobs.

Reducing Liability

To reduce the risk of legal liability, employers must be prepared to show evidence there was a business justification for a reduction in force or position elimination. While courts are unlikely to second guess the informed decisions of business executives, they may reject reasons that emerge after the fact. This means that employers must establish a contemporaneous record-e-mails, reports, spreadsheets, meeting notes-that show a decision to downsize or eliminate a position was based solidly on business considerations.

When a position is eliminated, the employer should be able to show evidence of the discussions regarding the need to cut costs. If, in the above example, the employer can prove it needs to retain the functions contained in the vice president's job description, that business decision is unlikely to be second guessed. The employer should then be able to prove that it considered who could best fill the newly combined vice president/plant manager position going forward, including the criteria it considered (such as experience and education), that it reviewed the work history of all candidates, and that it can articulate a sound reason for its choice.

When an employer is considering eliminating one or more employees holding the same position, it should do two things: Assure it can prove the business rationale for downsizing and be able to show it established non-discriminatory criteria for use by management in selecting employees for termination. Those criteria should be reviewed by a human resources professional or legal counsel to assure that the employer is only considering "reasonable

factors other than age." To the greatest extent possible, the employer should use objective criteria, as subjective assessments are more likely to contain age bias, whether intentional or not.

The results of the selection process should include consideration of employee work history. A disparity between the work history and scoring on the selection criteria may suggest bias in the process. Employers should also consider performing a statistical analysis to determine if any protected group of employees is being disproportionately affected and whether process adjustments are warranted.

Employers also need to be conscious of changes in workplace culture and need to manage employee expectations. Older workers expect to stay with the same employer for their entire careers and still expect their length of service will be heavily weighed in any cuts or downsizing. Employers should make sure that employees understand the factors likely to be considered for advancement or reduction, so that all employees, regardless of age, can fairly compete for all opportunities.

What to Consider When Hiring

First, make sure your applications are Equal Employment Opportunity (EEO) compliant and do not ask for age identifying information, such as birth date, photo, or high school/college graduation dates. Eliminating this information from the form will not prevent the employer from approximating an applicant's age, but it does look bad if an employer actively seeks age identifying information.

Second, establish criteria for the candidate selection. A job description is a good starting point. Failing to consider an older candidate who meets the specifications will be suspect. For candidates who appear to satisfy the job description, establish selection criteria as you would in a downsizing and make sure they are "reasonable factors other than age." Everyone involved in the interviewing and hiring process must understand that the same factors need be considered for each candidate.

Before rejecting a candidate as "overqualified," make sure you can explain why this is a negative. For many people, including jurors, the idea of getting a highly qualified employee at a discount intuitively sounds like a prudent decision. If you cannot explain how being overqualified is a negative, then it should not be a consideration in hiring.

Some employers discount older job applicants based on a belief that they will not stay long enough to recoup training and other start-up costs. This view is not supported by demographics, which show that older workers are less likely to job-hop than younger workers and are increasingly likely to work beyond age 65. As a result, your chances of recouping your investment may actually be better with an older worker.

Employment litigation is an exercise in determining whether an employee or job applicant has been treated fairly. Employers need to be able to stand in the shoes of an employee or applicant (or, as importantly, in the shoes of a potential juror) and assess whether the employer's decision-making process would intuitively appear fair and reasonable. n

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