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Federal Judge: Did Employer use Experience Requirement to "Weed Out" Older Workers? Maybe.

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Mark Twain once said, "Age is an issue of mind over matter. If you don't mind, it doesn't matter."

I add: "Until your employer cares. Then it matters."

When you're at the beginning of your career, your main obstacle is trying to cast the little experience you have in a light that makes you seem incredibly experienced and able to handle anything your employer decides to launch at you, despite the fact that you have no idea what you're doing.

At the other end of the spectrum is Dale Kleber, a fifty-nine-year-old attorney and former General Counsel of a Fortune 500 Company. When he applied for a job at CareFusion Corp. that required far **less** experience than he utilized at his Fortune 500 Company, he found out in a rather unfortunate way that some employers may in fact value (less) age over (more) experience.

Mr. Kleber applied for the "Senior Counsel, Procedural Solutions" position at CareFusion. The job posting stated a preference that candidates should have "3 to 7 years (no more than 7 years) of relevant legal experience." Not only was Mr. Kleber and his far-more-than-seven-years-of-experience not invited to interview for the position, but those who were interviewed all had seven or fewer years of legal experience. Mr. Kleber filed suit in federal court for Northern District of Illinois, claiming that the requirement that applicants have seven years or less of legal experience was intended to "weed out older applicants such as himself."

Mr. Kleber made two claims. His first claim, a disparate impact claim under the ADEA, failed because the ADEA does not protect job applicants who bring a disparate impact claim premised on an alleged failure to hire.

The second claim is where the case gets interesting. Deciding on the employer's motion to dismiss Mr. Kleber's case, the federal judge hearing the case first reiterated that an employer "does not commit age discrimination when it declines to hire an overqualified applicant," and pointed to a 1993 U.S. Supreme Court case that held that an employer may in some cases lawfully draw a distinction between age and years of service,

taking one into account "while ignoring the other." In this case, however, the judge found it possible that something else was going on: CareFusion may have unlawfully used experience as a proxy for age if it purportedly made its hiring decisions based on "experience" but in truth was trying to "weed out" older applicants. Such an attempted workaround, the judge found, "could constitute age discrimination."

In fact, the judge found, this scenario was specifically foreseen by the Supreme Court in its 1993 decision, when it wrote that it could "not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination." Experience, like pension status, accumulates as a function of age. At the motion to dismiss stage of the lawsuit, this was enough for Mr. Kleber to have an adequately pled claim for disparate treatment under the ADEA. His lawsuit lives to grow another day older.

What does this mean for you? This decision should reinforce the notion that age discrimination can take many forms — even the experience requirements in a job posting. Make sure that the level of experience you want to bring to your company doesn't intentionally exclude older, and typically highly compensated, workers. Experience requirements (especially those involving an experience cap) should be reasonable, fact-based, and supported by evidence and documentation. Anything less risks the type of age discrimination lawsuit described above.

Topics

Age Discrimination