

EVALUATING THE AGE DISCRIMINATION CASE

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In today's economy, with downsizing and outsourcing, a greater number of people are losing their jobs. Many of them are people who have worked for their companies for many years. Everyone selected for a layoff or who loses their job due to economic reasons feels that their employer's actions were wrong. The typical call we receive is that: "I was unfairly let go and I think I have a wrongful termination case." As trial lawyers can we help these people? How do we decide what their rights are? The wise employer is careful to craft any layoff to avoid the appearance of discrimination. Many companies will offer a severance package in exchange for a general release. Evaluating these cases requires knowledge of an ever-changing area of law, and understanding how we can discover and prove discriminatory intent.

In New Jersey, most employees are employees at-will. Absent discrimination, an employer can terminate an employee at any time. Unfortunately, older and disabled employees often bare the brunt of these layoffs. Hidden within 50 or 100 employees let go are often those employer perceives to be less valuable due to their age.

The New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq., protects these workers. Trial lawyers need to be able to ascertain when unlawful discrimination has played a role in the client's termination. These cases are often labor intensive and represent significant challenges, but they can also be extremely rewarding from a personal and professional standpoint.

There are two general types of discrimination cases. The first and most obvious is a disparate treatment case. The second and more difficult to evaluate and prove is a disparate impact case. A disparate impact case involves an employment practice that is, on its face neutral in its treatment of different groups, but in fact the impact of this policy falls more harshly on a protected group, and this policy cannot be substantiated by a justified business necessity. Esposito v. Township of Edison 306 N.J.Super. 280 (App.Div. 1997)

A disparate impact case is a very difficult case to evaluate without discovery. An example of such a case is a fire department setting a physical requirement beyond what is required to do the job in order to keep out women applicants. Absent a legitimate business necessity, this may run afoul of both State and Federal law. An entire law school class could be dedicated to this topic. This article, however, will focus only on the proofs necessary to establish a discriminatory treatment case. For a good discussion of disparate impact in an age discrimination case see Maidenbaum v. Bally's Park Place 870 F. Supp. 1254 (1994) and Esposito v. Township of Edison 306 N.J.Super. 280 (App.Div. 1997).

To properly evaluate a potential case it is essential that the lawyer understand what is required to prove our case. In New Jersey, our courts have traditionally looked to the Federal courts in examining disparate treatment cases. McDonnell Douglas Corp. v.

Green 411 U.S. 792 (1973) Grigoletti v. Ortho Pharmaceutical Corp. 118 N.J. 89 (1990)

The elements that need to be proved in a disparate treatment case are:

1. The plaintiff is in a protected class. (age, disability, gender, etc.)
2. The plaintiff was performing up to the legitimate expectations of their employer.
3. The plaintiff suffered an adverse employment action.
4. The plaintiff was replaced by an employee not in the protected class.

Or

The adverse employment action occurred under circumstances that give rise to unlawful discrimination

Each of these elements has been the subject of litigation regarding their meaning and applicability.

In New Jersey the definition of a protected class is much broader than in the Federal courts and in many other states. The age class in New Jersey can be anyone over 40. There is also case law that establishes that even younger workers (18 or over) can be in an age- protected class. There are many examples of other protected classes in New Jersey. Disability, gender, religion, race, national origin and even sexual preference have been recognized as protected classes of workers.

Federal law in New Jersey also protects workers who are in a protected class. An employee can bring a civil rights action pursuant to Title VII, or bring an action under the Older Workers Protection Act. (OWPA). The Americans with Disabilities Act (ADA) or the Family and Medical Leave Act (FMLA) may also protect disabled employees

For practical purposes, an older employee's rights are very well protected under New Jersey law. Bringing one of these Federal claims only complicates an already difficult case. Unless forced into Federal court by diversity or some other issue, there is generally no tactical or legal benefit in taking that approach. The only goal is to win the case, not to prove as many legal points as we can.

Proving that our client is in a protected class is usually rather easy. However, if our client is anything other than what most jurors would consider an older worker, then we must consider how the jury will perceive your client and his reduced future earning capacity. A plaintiff is almost always better off filing under our New Jersey Statute (LAD) than attempting to prove a violation of Title VII or another Federal civil rights statute. Keep in mind that a prerequisite to filing a federal civil rights case is the filing of an EEOC complaint with that administrative agency. In New Jersey, our courts have recognized that in a discrimination case, there is a cause of action even for discrimination based on a misperception of someone's status. In addition, a successful prosecution of an age discrimination case pursuant to LAD will always result in an award of attorney's fees.

The biggest fight is often the second element of our *prima facia* case. Working up to the legitimate expectation of the employer does not mean being the best employee but rather one who is performing in such a manner that there would be no legitimate reason to terminate or replace that employee. Raises, performance evaluations and accomplishments are all excellent ways to prove our client's worth. The best of these cases involve employees with more than 5 years of service. It is very difficult for an employer to argue that the client is a poor performer when they have worked for the company for a lengthy period of time. In our initial interview we must always ask for details about the employee's performance. In many cases we will find that these older clients have a long successful history with their employer and there appears to be no rational business reason for their dismissal. If the client has a poor or erratic work history we may need to give that case greater scrutiny before it is accepted. We recently had an interview with a potential client who appeared to have a strong case, but when he revealed his poor work history (six jobs in ten years) we passed on his case.

The next element we need to prove is that the employee suffered an adverse employment action. Being fired is the clearest example of an adverse action. Being transferred, being demoted, being denied a raise or a specific opportunity have also been held to be adverse for purposes of a disparate treatment case. Shepherd v. Hunterdon Developmental Center 174 N.J. 1 at p. 27. Generally being treated in what an employee considers to be an unfair manner is not quite enough, absent additional facts. Being yelled at is not an adverse action. This raises a related issue.

A disparate treatment case is not a workplace harassment case. Harassment in the workplace is a separate cause of action. The proofs, the evidence and the standards are entirely different. In short, a workplace harassment case requires a plaintiff to prove that he/she was the subject of severe and pervasive harassment directed at the employee due to his/her status as a member of a protected class. Harassment of a worker or even coworker in a protected class, however, may be probative and admissible to prove the discriminatory intent needed in a discriminatory treatment case. Lehmann v. Toys "R" Us 132 N.J. 587 (1993). Hurley v. Atlantic City Police Dept. 174 Fed. 95 (3rd. Cir. 1999).

Sometimes it is very clear that there is an adverse action. In other cases, however, the company will argue that there are legitimate business reasons for the transfer or the action. The key is to request in discovery as much information as possible about how the company is structured and does business. Always ask for a table of organization, and personnel charts, as well as job descriptions so that we can truly understand what the company does and how they do it. What coworkers are doing and their performance evaluations are necessary and discoverable. Dixon v. Rutgers 110 N.J. 432 (1988). Do not be afraid to depose a witness solely on this issue. Our clients are often our best assets. They usually know how to find this information and are very well motivated. Use the intelligent client in this discovery process.

Traditionally, in a discrimination case, the law had required proving the plaintiff was replaced by a worker not in the protected class. In New Jersey, both our State Courts and Federal Courts have modified the need to prove this fourth element. In many cases, depending on the facts, it is sufficient to prove only that “the adverse action occurred under circumstance that give rise to discriminatory intent.” Williams v. Pemberton Township Public Schools 323 N.J. Super. 490 (App.Div. 1999) This is extremely helpful in proving age discrimination in a layoff case. A company’s standard defense in this type of case is that the job was eliminated. The plaintiff no longer needs to prove that he was replaced, but simply that he was selected for layoff based on discrimination.

To prove this element, much of the information concerning what went on in the work place is admissible. Because of this necessity we can introduce a wide variety of evidence. Clearly, adverse statements and acts directed at our client are relevant, but the courts have also consistently ruled that those directed at others in the protected class may also be admissible to prove “discriminatory intent”.

For example, if we are trying to prove that our older employee was transferred to a less desirable position in order to convince him to retire, we could introduce evidence of another older employee who had been treated in the same fashion. The court obviously must act as gatekeeper regarding this evidence, however the case law supports the use of this testimony over objections based on both Evidence Rule 403 and Rule 404(b) Ryder v. Westinghouse Electric Corp. 128 Fd. 128 (3rd Cir. 1997)

Understanding and proving these elements is required to successfully prosecute an employment discrimination case. The trial judge is going to review the case on a summary judgment motion using the McDonald –Douglas test. The jury charges and the proof required in court will also focus on these elements. The model jury charge has recently been revised to make the jury’s understanding of these issues easier.

Traditionally under the McDonald –Douglas test the plaintiff was required to produce evidence at trial to establish a *prima facia* case of discrimination. Once this was done the burden then shifted to the defense to establish a legitimate business reason for the employment action. If the defense could produce evidence of a legitimate business reason, the plaintiff needed to prove that the defense was a mere pretext and that the real reason for the action was unlawful discrimination.

This is still the standard but the model charge committee has wisely taken some of this confusing burden shifting out of the hands of the jury. The court will now decide if the plaintiff has met their burden of a *prima facia* case and only have the jury decide the overall questions of discriminatory intent.

Traditionally, trial lawyers feel more comfortable having a jury decide these issues. Experience has dictated, however, that the burden shifting charge is more confusing than helpful. Now the jury is left simply deciding the ultimate question as to whether or not the actions on the part of the defendant were unlawful. From the plaintiff’s perspective, this is certainly more helpful since the jury is going to look at the totality of the circumstances and generally try to do what is right and just. If we have chosen and

prepared our client's case properly, this should be a much easier question for the jury to decide in our favor.

The key to the successful age discrimination case is proving that the employer's actions were done with discriminatory intent. This is almost always done based on circumstantial evidence. Rarely is an employer going to leave a trail of direct evidence to establish discriminatory intent. We should be hesitant to venture into cases where we cannot prove the first three elements of McDonald -Douglas.

It is generally not one event or comment but a series of events or actions that will prove our case. Circumstantial evidence is not only permitted in these types of cases, but is generally required in order to prove age discrimination. The plaintiff's favorable work history and the absence of legitimate business needs, when properly presented, are often sufficient. From the initial interview, look at the case with an eye of how we are going to stack up the evidence to prove each element and how we are going to prove intent. The right discovery and the right client should be enough to prove your case. Finally, is the client and the case something that jurors are going to relate to? If the client is unappealing, if the client strikes us as someone we might not hire, then a jury may view the facts the same way.