Avoiding Age Discrimination Claims in Succession Planning

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A recent report released by the Department of Labor estimates that by 2016, approximately 33 percent of the total workforce in the United States will be older than 50. By 2050, the same report suggests that 19 percent of the U.S. workforce will be 65 or older. As the average age of the workforce continues to increase to an all-time high, employers are often confronted with the need to identify and train future business leaders who will replace their most experienced and knowledgeable employees when they decide to move on to other business endeavors, become ill or simply retire. When considering business succession-planning strategies, employers may face a variety of exposures, including potential liability pursuant to the Age Discrimination in Employment Act, if the information gathering and planning process are not approached in the right way.

Many of us recognize the time-honored saying, "It is not what you say, it is how you say it." Employers considering business succession plans are now realizing that it is both "what you say" and "how you say it" that are vital. As an example, in *Romantine v. CH2M Hill Engineers*, 2010 U.S. Dist. LEXIS 136011 (W.D. Pa. 2010), the court denied summary judgment and permitted the plaintiff's age discrimination claims to proceed to trial following the plaintiff's layoff.

There, the plaintiff, Ralph Romantine, alleged that the company's executives made comments concerning the organization's plans for succession prior to Romantine's layoff, including wanting to get "younger and cheaper" and "getting rid of white-haired men to lower overhead costs." In addition, Romantine alleged that his supervisor made several inquiries and comments regarding his plans for retirement.

Although the court correctly noted that "many courts have recognized that an employer may make reasonable inquiries into the retirement plans of its employees for purposes of succession planning or to address rumors concerning retirement for purposes of staffing," other courts have "also recognized ... that some retirement inquiries are so unnecessary and unreasonable [and] may constitute evidence of age discrimination." In the context of Romantine's lawsuit, the court determined that the assertions that he was asked about when he was planning to retire on four to six occasions were sufficient "evidence from which a reasonable jury could believe that an ageist environment or atmosphere existed ... and that [the] retirement comments to plaintiff were not jokes but an attempt by [the supervisor] to fall in line with [the] corporate philosophy that [the plaintiff's division] needed to get younger."

Inquiries regarding plans for retirement do not, necessarily, always rise to the level of unlawful discrimination. In *Lefevers v. GAF Fiberglass*, 667 F.2d 721 (6th Cir. 2012), the court rejected the plaintiff's claims of age discrimination following his termination for poor performance in connection with a reduction in force. Specifically, George Lefevers alleged that employees asked him and other co-workers "when are you going to retire," commented that "we realize you guys are getting old and would like to know if any of you are going to retire," and also stated that "I don't understand why you

older employees — old employees — think we're trying to get rid of you. We need you to run this plant." In upholding the dismissal of Lefevers' claims, the U.S. Court of Appeals for the Sixth Circuit held that "questions concerning an employee's retirement plans do not alone constitute direct evidence of age discrimination." The court found that there was no evidence that any employee suggested that Lefevers retire, "but that they merely inquired generally about his, and others', plans regarding retirement."

Moreover, the court noted that Lefevers failed to present evidence that his termination because of poor performance was a pretext for age discrimination, quoting Leo Tolstoy to suggest that "'we do not beat the wolf for being gray, but for eating the sheep."

Similarly, *Boston v. Blue Cross Blue Shield of Kansas*, 431 Fed. Appx. 763 (10th Cir. 2011), dismissed the plaintiff's failure to promote a claim filed after the plaintiff retired, noting that the Tenth Circuit "reject[s] the notion that any mention of succession planning is tantamount to pretext [and] compliance with the ADEA and succession planning need not be mutually exclusive" and further reasoning that the plaintiff admitted that "succession planning is obviously necessary for a corporation." In *Rexses v. Goodyear Tire & Rubber*, 401 Fed. Appx. 866 (5th Cir. 2010), the court rejected the plaintiff's age discrimination claim and noted that the plaintiff's perception that he was "encouraged to engage in succession planning" was not supported by the record evidence and succession planning was discussed only after the plaintiff threatened to resign, reasoning that "an employer's inquiry into an employee's age and retirement plans is not by itself evidence of discriminatory intent." In *Betz v. Chertoff*, 578 F.3d 929, 934 (8th Cir. 2009), the court noted that "reasonable inquiries into an employee's retirement plans do not permit an inference of age discrimination."

While employers are generally successful in defeating a former employee's age discrimination claim premised solely on an occasional inquiry into the employee's retirement plans, these claims become much more difficult (and costly) to defend when evidence exists that other comments were made concerning the ages of employees when the company's business succession plan was discussed. From this, employers (and, in particular, decision-makers) must be cognizant to avoid using ageist "buzz words" (particularly "younger" and older") when discussing succession planning in the workplace.

Moreover, succession planning should be conducted at all levels of an organization to satisfy an employer's goals to hire, train, retain and promote talented employees. Succession planning should not focus only on what to do if and when senior leaders leave the company. By way of example, the Equal Employment Opportunity Commission recognizes the merits of succession development and planning as part of its federal sector "Executive and Senior Leadership Development Program." That program provides guidance to the EEOC concerning the selection process and other components, including mentoring, training, developmental assignments and evaluations, in order to ensure that future leaders will have "the right skills, knowledge and abilities ... to lead the agency in meeting its mission and challenges." Notably, the EEOC's program expressly states that "core succession training and development programs should be developed to include entry-level employees, mid-level management and senior executives to strengthen high-potential employees' skills and to broaden their experience."

Employers should train and mentor employees at all levels of their organizations in order to ensure that the employees will develop the skills necessary to succeed at each level when more experienced employees leave employment for any reason. In addition, employers should work to develop performance evaluations that will appropriately and accurately identify the key abilities and skills that will assist them in

identifying employees who have the capabilities to serve as future leaders of the company. Employers should, likewise, ask employees at all levels what their long-term and short-term goals are. If an employee responds that he or she plans on retiring in a year, employers can use that information to discuss the necessary transitions and/or to determine what further training might be necessary to ensure an effective succession.

Similarly, if an employer (or supervisor) does ask an employee whether or when he or she is planning to retire, the employer must make sure not to continuously revisit or dwell on the issue if the employee states that he or she has no plans of retiring. As noted above, lawsuits filed with respect to this issue generally result from a perception that the employer is forcing the employee out of the company. Finally, employers should continually refine and revise business succession plans to determine what works for the company and what the company needs to do differently in the future.

The bottom line is that courts have traditionally sided with employers when business succession plans are proffered as an employer's legitimate, nondiscriminatory business reason in the context of an age discrimination lawsuit. Business succession plans are appropriate to identify future leaders at all levels within an organization and should not focus only on the older workforce. There is no prohibition against discussing an employee's long-term and short-term goals, including retirement plans. However, both what is said and how it is said are important; those words can be the difference between a successful (and litigation-free) succession transition and a trial based on an employee's perception that he or she has been the victim of age discrimination. •

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