Hiring & Firing the Older Employee

Be wary of the reasons you give either verbally or in writing.

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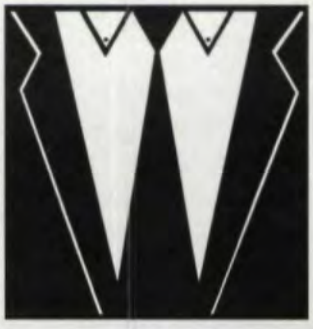
Given the current economic and legal climate, matters of hiring and firing are cause for considerable concern among managers. In addition to all the other factors to be considered, employers must be wary of exactly how these procedures should be carried out, so that the company is not left open to lawsuits based on charges of discrimination of one kind or another. The reasons given for a particular employment decision may be as crucial to determining liability as the decision itself.

Employers need to be especially wary in the case of employees over 40, who may have cause for litigation under the Age Discrimination in Employment Act ("ADEA"). Several recent cases illustrate the fine line an employer must walk when terminating or refusing to hire an older employee. While these cases relate to industries other than gear manufacturing, the issues they raise can affect any company and are, therefore, instructive.

A recent decision from the U. S. Court of Appeals for the Second Circuit, in New York, *Bay v. Times Mirror Magazines, Inc.*, provides vital clarification of two legal principles that are often litigated whenever an employee or job applicant sues for age discrimination. Both principles relate to the reasons given by the employer for the termination of the current employee or its refusal to hire a prospective employee. The *Bay* decision illustrates how the way in which an employment decision is justified can be critical to the employer's defense to an age discrimination claim.

Beware of "Overqualified"

The *Bay* case arose because of Times Mirror's acquisition of *Field & Stream* magazine, after which Times Mirror implemented a reorganization. As a result of the reorganization, plaintiff's position - a publisher of *Field & Stream* - was downgraded to one with less responsibility and a reduction in salary. The downgrade also required that Bay report to a second-level manager (a group publisher) instead of to the president of the company, as he did before the reorganization. Times Mirror interviewed Bay and others for the position of group publisher. But because Bay would not accept the demotion or the concept of group publisher, he was terminated. In his age discrimination lawsuit, Bay argued that he had been rejected for the posi-



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tion of group publisher because he was overqualified.

In so arguing, Bay sought to take advantage of the relatively new case law in the Second Circuit that an employer who refuses to hire a job applicant or fires an older worker because that person is "overqualified" for the position, may be guilty of age discrimination. This principle was established in *Taggart v. Time, Inc.* and *Binder v. Long Island Lighting Co. ("LILCO")*. The Second Circuit panels in these cases reasoned that, in general, the older a person gets, the more qualified he or she becomes. The Court's decisions reflected its concern that employers might use the excuse that a person is "overqualified" as a coverup for age discrimination. If employers could fire or refuse to hire "overqualified" applicants, it would essentially be providing employers with a pretext, i.e., a way of disguising the fact that age discrimination played a part in that decision.

In *Taggart*, a prospective employee had applied for 32 positions at Time Inc. and was not placed in any of them solely because he was said to be overqualified for some positions and underqualified for others. The Court held that *Time's* refusal to hire Taggart solely because he was overqualified constituted circumstances from which a reasonable juror could infer discrimination by *Time* by concluding that the reason given was not believable and therefore a pretext.

In the *Binder* case, an employee had been forced into early retirement after his position was eliminated. Plaintiff argued that positions had been available, but had been filled by younger people. LILCO did not contest that fact and instead defended its decision by stating that no available position was "suitable" or "appropriate" for Binder's level of skill and salary. Consequently, LILCO believed that Binder might become frustrated if a position made little use of his experience. In response to that contention, the Court noted that although a jury could conclude that LILCO was acting out of a genuine concern for Binder's job satisfaction, it could also conclude that

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LILCO's explanation was a pretext for age discrimination. The Court noted that the Age Discrimination in Employment Act "does not forbid employers from adopting policies against 'underemploying persons in certain positions so long as those policies are adopted in good faith and are applied evenhandedly.'" With that, the Court reversed the District Court's grant of summary judgment in favor of the employer.

The concurring opinion in *Binder* is instructive, for its warning led to the ruling in *Bay*. The occurrence suggested that *Taggart* and *Binder* may lead employers to believe that they can never hire or fire a person based upon whether that person is overqualified and that, if they do so, an age discrimination lawsuit will automatically go to trial. The concurring judge opined that an employer may actually have legitimate reasons for declining to employ overqualified individuals and should not be prohibited from declining to do so.

The *Bay* case responded to the call for clarification when it held that:

"Neither [*Taggart* nor *Binder*] forbids employers from deciding to place employees in positions for which they are overqualified on the ground that overqualification may affect performance negatively....The problem addressed in those cases is that *a conclusory statement* that a person is overqualified may easily serve as a mask for age discrimination."

Thus, the *Bay* court held that employers had to give an explanation whenever they failed to hire or terminated an employee on the grounds of overqualification. With respect to the decision to terminate Bay, Times Mirror had provided sufficient explanation in that there was more than a conclusory statement that Bay would have been overqualified. Indeed, Bay himself conceded at his deposition that he was dissatisfied with his downgraded position both because of his diminished responsibilities and because he would be required to report to a second-level manager. This was the very concept with which he disagreed. Given those facts, the Court held: "Dissatisfaction in a downgraded position is a legitimate reason for an employer to replace an employee with someone not distracted by such dissatisfaction."

When making hiring decisions, companies should carefully evaluate the applicant's qualifications against the duties of the job, and, if it is determined that a person is not appropriate for the job, or is not the best applicant available, be specific in the company's records about why the applicant is being rejected, rather than merely saying that he or she is "overqualified" for the job. Remember that companies are not required to tell applicants why they are not being hired. This is probably the best course to follow.

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zations, a similar course of action should be adhered to. Be specific about the reasons for the "overqualification." In addition, be mindful of the fact that the employee being asked to take a demotion is still on the premises. Communication is critical. Indeed, a key factor supporting the decision in *Binder* is that the plaintiff was never given any opportunity to say whether he would be content in a downgraded position. In contrast, Bay's opinion was clear: he "chafed at the diminution of his responsibilities," both while still employed and at his deposition. That fact was instrumental in the Court's decision that he in fact was "overqualified" for the position and that the employer's decision to terminate him was justified by a nondiscriminatory reason. Therefore, it is wise to give the employee every opportunity to show that he or she would or would not be dissatisfied with the demotion.

Salary and Length of Service as Factors

The *Bay* decision is instructive in another thorny, oft-litigated area - namely, the issue of whether an employer can make employment decisions based on a person's salary or length of service. Prior to *Bay*, consideration of either factor had been held impermissible under the ADEA. *Bay*, however, reached the opposite conclusion. In support of his claim that the most senior, highly compensated employees were eliminated after the reorganization, plaintiff urged the Court to consider an inter-office memorandum written by the Chairman of Times Mirror and circulated to James Kopper, the Executive Vice President to whom Bay had to report in the downgraded position. The memorandum noted that Bay's salary was well above the salaries of Times Mirror's other publishers and was more than Times Mirror would have to pay for a group publisher, the title just above plaintiff's. Plaintiff argued that these references to salary established that "high salary was a critical factor in the decision not to retain [him]."

The Court held that nothing in the ADEA prohibited an employer from making employment decisions that "relate an employee's salary to contemporaneous market conditions and the responsibilities entailed in particular positions in concluding that a particular employee's salary is too high. *To be sure, high salary and age may be related, but, so long as the employer's decisions view each employee individually on the merits, do not impose a general rule that has a disparate impact on older workers...and are based solely on financial considerations, its actions are not barred by the ADEA.*"

Despite this seemingly clear direction from the Second Circuit, decisions since *Bay* continue to grapple with the fine line between whether considerations of salary and length of service are in fact "based solely on financial considerations" or whether they provide evidence of age discrimination. In a decision from the Western District of New York, *Wolf v. Ferro Corp.*, plaintiff introduced two pieces of direct evidence in support of his age discrimination claim. First, he cited a statement from defendant, a manufacturer of speciality ceramics, that he was let go instead of a younger employee "because it was expected that [plaintiff] would retire soon, whereas [the other employee] was much younger and would continue to develop." The second piece of evidence was a statement regarding the standards the employer used to decide who should be laid off during the reduction-in-force: "We talked in terms of dollars...."

In deciding that Wolf's case had to proceed to trial, the Court noted that the first comment indicated that the comparative ages of the two employees factored into defendant's decision to discharge plaintiff, and the second comment indicated a "desire to 'replace an older employee with a young one for the sole purpose of economizing on salary costs.' "

Bay stands out as the notable exception to the general rule that salary and length of service are impermissible factors. If this split in the appellate courts continues, it is likely that this issue will head to the U.S. Supreme Court for resolution.

In the meantime, companies would be wise to assess each termination of employees over 40 using the criteria outlined in the *Bay* case; justify such terminations by evaluating the employee as to the substance of his or her performance, and relate the termination solely to the financial performance of the company and its need to save a certain sum of money - not to the salary of a younger employee. ■

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Companies should justify the termination of over-40 employees based on the substance of their performance and on the need of the company to save a certain number of dollars, not on the smaller salaries of younger employees.

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