3-27-1981

Outline For the Age Discrimination and Employment Act and EEOC Guidelines on Sexual Harassment

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OUTLINE FOR
THE AGE DISCRIMINATION AND EMPLOYMENT ACT
AND EEOC GUIDELINES ON
SEXUAL HARASSMENT
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March 27, 1981

By

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I

AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA)

I. 29 U.S.C. 621-634 - General.

A. Originally enacted in 1967; amended 1974; amended again 1978.

B. Coverage - protects individuals between 40 and 70 years;
applies to private employers of 20 or more employees (Title VII-15);
covers labor organizations and employment agencies (same as Title VII);
covers state and local governments (same as Title VII);
applies to federal government (coverage 40 to no upper limit).

C. ADEA's substantive and procedural provisions are similar but not identical to Title VII.

II. TIME LIMITATIONS AND OTHER PROCEDURAL PREREQUISITES

A. CP has 180 days from last act of discrimination to file charge with EEOC if no state agency dealing with age discrimination.

B. CP has 300 days to file charge with EEOC if state agency or within 30 days after notice by state that its age proceeding has concluded whichever is earlier.

C. CP's failure to file timely charge with state agency does not affect federal right; hence, as long as CP files charge with EEOC within 300 days (if in state prohibiting Age discrimination) CP has complied with prerequisite to filing suit. See Oscar Mayer v. Evans, 441 U.S. 750 (1979).

D. Best protection for CP - attempt to file with EEOC within 180 days.

E. Issue - When is the last act of discrimination in a discharge case? Most courts hold: time runs from notice of discharge rather than subsequent attempts (arbitration or internal procedures) to reverse the discharge.

F. CP must wait 60 days before filing suit after filing a charge.

Purpose - allow period for informal resolution of charge.

III. CHARACTERISTICS OF A PRIVATE ADEA SUIT

A. General

1) Either party can request jury trial (no juries in Title VII because equitable action).

2) No class actions may be brought pursuant to Fed. R. Civ. P. Rule 23 (unlike Title VII). However, opt in collective actions permitted. See LaChapelle v. Owens-Illinois, 513 F.2d 286 (5th Cir. 1975).

3) CP cannot intervene in ADEA suit brought by EEOC (CP in Title VII has statutory right to intervene in an EEOC suit).

4) EEOC suit cuts off rights of private CP.

B. Statutes of Limitations

1. CP must file suit within three years of discriminatory act for willful violations of ADEA; two years for other violations.

2. Willfull violation - any violation that is intentional, knowing, or voluntary, as opposed to accidental. Almost all violations are willful. See Wehr v. Burrough Corp., 619 F.2d 276 (3rd Cir. 1980).

3. Limitation period may be tolled for EEOC but not for private party up to 1 year while attempting to secure employer's voluntary compliance.

C. Damages

1. CP can recover "amounts owing" - backpay

"liquidated damages" - double damages for willful violation; non discretionary - hence if violation is willful CP must get damages liquidated.

"Other legal or equitable relief (reinstatement).

2. Most courts against awarding punitive damages:
argument for - punitive damages are form of legal relief; generally available under a statute unless specifically negated.
argument against - creates windfall to CP since they already receive liquidated damages.

IV. EEOC ENFORCEMENT ACTIONS

A. Prior to suit EEOC must attempt to eliminate the discriminatory practice through informal methods of conference, conciliation and persuasion. Statutory requirement - section 7(b).

B. Elements of Conciliation

1. inform employer of violation.

2. necessary measures for compliance.

3. back wages may be recovered by employees.

4. EEOC may bring suit.

5. opportunity for employer to respond.

V. PROHIBITIONS OF ADEA

A. Employer cannot refuse to hire, or discharge, or discrimination against any individual with respect to his compensation, terms, conditions or privileges of employment because of age (two exceptions--certain tenured professors until 1982 and executives with retirement benefits of 27,000 can be involuntarily retired between 65-70).

B. Limit, segregate or classify employees. . . denying employment opportunity or otherwise adversely affecting their status because of age.

C. Employer can not reduce the wage rate of employee in order to comply with ADEA.

D. Retaliation provision - can not discriminate against individual because they have filed a charge, testified or assisted in any investigation, proceeding or litigation under ADEA.

VI. STATUTORY DEFENSES

A. Lawful for defendant to discriminate if the differentiation is based on reasonable factors other than age.

Discharge case - issue is a "factor other than age," the higher salary of an older employee?

Older employee in the same position as a younger employee will generally earn more because of seniority. Hence - is the older employee's higher salary "a factor other than age" and therefore a valid criterion justifying the discharge?

Courts split - depends on facts.

B. Employer can discharge or otherwise discipline an individual for good cause.

Employer may show CP's performance was substandard or CP had negative attitude toward job or co-employees. Employer may show other employees similarly situated were disciplined in same manner.

C. Age as a Bona Fide Occupational Qualification (BFOQ) - defense.

1. Congress has allowed discrimination based on age whenever age is "reasonably necessary to the normal operation of the particular business."

2. BFOQ can not be based on stereotyping; defendant has burden of proving empirical data supporting their assumption. Courts construe BFOQ's narrowly.

3. BFOQ defense accepted most frequently where safety issue important. Bus drivers; airline pilots; firemen. Hodgson v. Greyhound Lines, 499 F.2d 859 (7th Cir. 1974). See also EEOC v City of St. Paul, 23 EPD Par. 31,078 (D. Minn. 1980), where trial court concluded that age was not a BFOQ justifying age 65 forced retirement of a district fire chief. BFOQ upheld, however, for line firefighters.

D. Employer Adherence to a Bona Fide Seniority system or any bona fide employee benefit plan such as retirement, pension or insurance plan which is not a subterfuge to evade purpose of ADEA, except no plan may require the involuntary retirement of any individual between 40-70.

1. This provision indicates Congress' recognition that employee benefit plans may cost more for older workers than the cost for providing those same benefits to younger workers.

2. Accordingly, Labor and now EEOC guidelines permit an employer to provide reduced benefits to older workers if the reduction can be justified on the basis of cost or reasonable actuarial data. Hence, no violation of ADEA, if benefits reduced for older workers as long as cost to employer for older workers is the same as cost for younger workers, although younger workers may be receiving greater benefits. Actual data may be computed with respect to an entire benefit package or on a benefit by benefit basis.

3. To reduce benefits for older workers

   a. plan must be bona fide

   b. action taken must observe the terms of plan

   c. can not be a subterfuge to avoid ADEA

   d. must be based on actuarial data

4. This provision also applicable to lay off situations;

   a. prior to 1978 Amendments--if company faced with layoff, could force older workers to take advantage of early retirement, if action taken pursuant to bona fide retirement plan.

   b. if there was no provision for early retirement, then the forced retirement was violation of ADEA.

   c. <u>now</u> - this section prohibits forcing older employees to take advantage of early retirement.

VII. <u>PROVING AN ADEA VIOLATION</u>

A. Problem - Plaintiff must prove that defendant made decision because of CP's age. Difficult to prove this through overt acts or employer statements but can be done through presumptions and inferences.

B. Allocation of Proof in an ADEA case similar to Title VII.

   1. See <u>McDonnell-Douglas Corp. vs. Green</u>, 411 U.S. 792 (1973) (first Supreme Court decision on burdens of proof in Title VII case).

2. Texas Dept. of Community Affairs v. Burdine, U.S., No. 79-1764 (March 4, 1981)(Supreme Court's most recent decision on burden of proof under Title VII).

3. Cova v. Coca-Coca Bottling, 574 F.2d 958 (8th Cir. 1978)(ADEA discharge case which sets out burdens for parties); see also Loeb v. Textron Inc., 600 F.2d 603 (1st Cir. 1979).

   a. Plaintiff must first establish prima facie case by showing:

      1) CP within protected group (40-70);

      2) CP met applicable job qualifications;

      3) despite qualifications, CP was discharged;

      4) after discharge, employer sought applications from persons with similar qualifications

      NOTE: Employers frequently argue that CP replacement must be outside the protected class--younger than 40.

   b. Employer now has burden of production to rebut prima facie case by showing:

      1) the discharge was "for good cause" or;

      2) the discharge was "based on reasonable factor other than age."

   c. Plaintiff must then establish defendant's explanation is pretext for age discrimination.

C. Plaintiff's Burden - Demonstrate age influenced the adverse employment decision.

   1. Courts split - lenient view--if age considered then improper.

   2. More common view - "but for test"--CP must show that age was a determining factor--a real reason--for defendant's action. The adverse decision would not have been made but for CP's age. See Loeb v. Textron Inc., 600 F.2d 603 (1st Cir. 1979).

D. Statistical Evidence

1. Can be used by both plaintiff and defendant to support various inferences.

2. Most commonly used in layoff and reorganization cases:

   a. Compare age composition of workforce before reorganization to age of workforce after reorganization.

   b. Average age of discharged employee versus average age of retained employees.

   c. The statistics between groups should show large discrepancy in age. Mastie v. Great Lakes Steel Corp., 424 F. Supp. 1299 (E.D. Mich. 1976).

SEXUAL HARASSMENT

I. THE PROBLEM

A. Most commonly men exploiting their position and power over women in the workplace so that they can make sexual advances or suggestions. Issue is--is this conduct a violation of Title VII of the Civil Rights Act of 1964?

B. Frequency.

II. EEOC'S GUIDELINES ON SEXUAL HARASSMENT - 29 CFR 1604.11

A. General

1. EEOC amended its guidelines on sex discrimination to include section on Sexual Harassment. 45 Fed. Reg. 74,676 (Nov. 10, 1980).

2. Guidelines criticized by employer groups during comment period. 45 Fed. Reg. 25,024 (April 11, 1980).

B. Content

1. Definition of Sexual Harassment -- unwelcomed sexual advances, or requests for sexual favors, and other verbal or physical conduct constitutes sexual harassment when:

   a. submission is a condition of employment;

   b. submission or rejection of conduct is basis for employment decisions;

   c. conduct has the purpose or effect of unreasonably interfering with individual's work performance or creating an intimidating, hostile or offensive work environment.

2. When determining sexual harassment, EEOC looks at record as a whole and totality of circumstances. Harassment is fact specific and to be determined on case by case basis.

3. Sexual harassment committed by supervisor--employer held strictly liable regardless of whether employer knew or should have known of harassment.

4. Sexual harassment committed by non-supervisory or line personnel -- employer held liable only where it knew or should have known of sexual harassment. Employer can obviate liability by showing it took immediate steps to correct problem.

5. Prevention - most effective means of avoiding liability. Affirmatively raising subject, expressing company disapproval -- penalty for those engaging in sexual harassment, develop appropriate sanctions, inform employees how to raise issues.

C. EEOC's purpose in promulgating guidelines -- codification of existing law; prevention.

III. LEADING DECISIONS ON SEXUAL HARASSMENT

A. Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979). Employer held liable for sexual harassment committed by supervisor even though:

1. Employer had policy against sexual harassment;

2. Employer had internal procedures for bringing problem to higher management and plaintiff failed to exhaust these remedies.

B. Bundy v. Jackson, _____ F.2d ____, 24 FEP 1155 (D.C. Cir. 1981).

Employer held liable even though victim of sexual harassment suffered no loss of any economic or tangible job benefits -- no failure to promote or job abolished.

Burden of proof different in sexual harassment case --once plaintiff has shown sexual harassment and trying to establish backpay for failure to promote, "plaintiff should enter ritual order of proof at advantage over typical Title VII claimant."

C. Tompkins v. Public Service, 568 F.2d 1044 (3rd Cir. 1977); Garber v. Saxon, 522 F.2d 1032 (4th Cir. 1977); Barnes v. Costle, 561 F.2d 973 (D.C. Cir. 1977); All hold--cause of action under Title VII against an employer where supervisor was guilty of sexual harassment and plaintiff suffered adverse job status (i.e., bad evaluation, failure to promote, fired, or other aspects of career development).