

# Age Discrimination In Employment

by Susan Boyd, J.D.

**The Age Discrimination in Employment Act** (ADEA) was adopted in 1967. Section 4 (a) states:

*It shall be unlawful for an employer--*

- 1. to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;*
- 2. to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or*
- 3. to reduce the wage rate of any employee in order to comply with this chapter.*

The ADEA applies to unions and employment agencies as well as all public and private employers. The ADEA covers all employees (and prospective employees) aged 40 and over.

It does not protect younger people from discrimination based on age. An employee doesn't have a case because her employer thought she was too YOUNG for the job!

An employee or prospective employee who files suit against an employer for a violation of the ADEA must prove:

1. he/she is 40 or over
2. he/she was terminated, demoted or otherwise adversely affected
3. he/she was doing the job well enough to meet the employer's legitimate expectations, and
4. a younger person was treated more favorably. Originally, the older employee claiming age discrimination only had a case if he/she was replaced by or not hired in favor of a person under 40 (someone not in the class of persons protected by the ADEA). Since then, the Supreme Court has stated that the older employee still has a case as long as he is replaced by someone ANY younger, even if that person is over 40 too.

**Bona Fide Occupational Qualification (BFOQ):** Does the ADEA mean you can't fire someone because he's over 40? No, you can discharge or discipline an employee FOR GOOD CAUSE regardless of age. You can also require an older employee, along with the rest of your employees, to abide by a bona fide seniority system. For example, you may be paying a younger employee more and giving her a better work schedule because she's been there longer. Finally, you can make decisions based on age if it's a BFOQ.

However, age isn't a BFOQ just because an employer THINKS a younger person is better for the job OR because his customers want someone younger. For age to qualify as a BFOQ, the employer must be able to show expert evidence that a significant aspect of the job is affected by age. An example of this is airline pilots. Concrete evidence demonstrates that a pilot's skills diminish after a certain age.

Airlines are legally permitted to use age as part of the criteria for employment decisions regarding pilots.

**Mandatory Retirement:** With a few exceptions, including firefighters and law enforcement officers, mandatory retirement was made illegal by a 1986 amendment to the ADEA.

**Financial Considerations:** What if a business is in serious financial difficulty, and needs to reduce staff to cut expenses? Who are the employees most likely to be the highest paid, and therefore the most expensive to keep? OLDER employees. Does the ADEA prevent a financially strapped business from letting anyone over the age of 40 go? No, the ADEA does not prohibit the elimination of an over-40 employee's position for critical budget reasons. However, the economic reasons must be REAL and SUBSTANTIAL. Courts will not tolerate an employer's use of minor financial problems to hide his true intent to eliminate older workers.

*This article originally appeared in the Summer 2003 (Vol. 7, Issue 2) Family-Owned Business Institute newsletter, Heritage. Susan Boyd is an Applied Assistant Professor of Business Law at the University of Tulsa and the Director of the Genave King Rogers Business Law Center. You can email her at: susan-boyd@utulsa.edu.*