

EEOC Attacks Law Firm Retirement Again

Several years ago, the controversial issue of mandatory retirement of law firm partners reached the Seventh Circuit, which rendered an equivocal decision resulting in an expensive settlement for Sidley Austin LLP. That issue is not dead. The EEOC has now filed another age bias suit against another international law firm, Kelley Drye & Warren, LLP, which required mandatory retirement of partners at the age of 70.

EEOC v. Kelley Drye & Warren, LLP

On January 28, 2010, the EEOC filed a complaint against Kelley Drye on behalf of a former firm partner and a class of other similarly situated employees. The complaint alleges that Kelley Drye has a partnership agreement requiring all lawyers who reach age 70 and wish to continue to practice law to relinquish any equity interest in the firm. These senior lawyers are allegedly thereafter compensated solely by an annual "bonus" that is wholly discretionary with the firm's executive committee. According to the complaint and the EEOC press release, the particular former partner in question has been paid significantly less than younger lawyers with similar client collections, billings and other measures of productivity, even though he routinely collected over \$1 million annually in client fees. This, the EEOC alleges, is an unlawful employment practice in violation of the Age Discrimination in Employment Act (ADEA).

There is also a retaliation claim in the case. The complaint alleges that after the former partner filed a charge with the EEOC, the firm retaliated by reducing his annual "bonus" from \$75,000 to \$25,000, even though his collections and other measures of productivity had not declined from previous years.

The EEOC complaint seeks an injunction and the institution of policies and programs to eradicate the effects of the firm's current policy. The complaint also seeks back pay, liquidated damages and prejudgment interest, and compensation for non-pecuniary losses including pain, suffering and humiliation resulting from the firm's retaliatory conduct, as well as punitive damages.

Partner v. Employee

"True partners" are not protected from law firm mandatory retirement policies by the age discrimination laws. The ADEA only protects employees. In *E.E.O.C. v. Sidley Austin Brown & Wood*, 315 F.3d 696 (7th Cir. 2002), a highly publicized suit which came before the Seventh Circuit, the firm decided to "de-equitize" a group of older partners. A major issue in the case was whether anti-discrimination laws protecting employees applied to law firm partners; that is, whether partners can be considered employees rather than employers. The EEOC alleged in *Sidley* that Sidley was governed by an unelected executive committee and that this centralized management made most of Sidley's "partners" employees in reality, even if not in name. The Seventh Circuit held that "there is enough doubt about whether the 32 demoted partners are covered by the age discrimination law..." and remanded the case to the District Court for a determination regarding whether the downgraded partners were employees or employers. *Sidley*, 315 F.3d at 707.

The *Sidley* lawsuit settled in 2007, with the firm paying \$27.5 million to 32 former partners.

Generally, for law firms and similar professional associations, such as accounting firms, courts focus on certain key factors in analyzing the "partnership v. employee" distinction. Those factors include ownership interest, management control, share in firm profits and losses, voting rights, job security and participation in firm policy-making.¹ While the courts have provided guidance on the partner vs. employee issue, no bright line test has been formulated. The issue must still be resolved on a case-by-case basis.

NYSBA and ABA Recommendations

Mandatory retirement of partners has been hotly debated. A New York State Bar Association (NYSBA) committee established to study mandatory retirement at law firms noted in January 2007 that a then-recent survey found mandatory retirement in 57% of firms with at least 100 lawyers. The committee concluded that no legitimate reason existed for blanket mandatory retirement policies, that such policies hurt law firms as well as the legal profession, and recommended an end to mandatory retirement.

In August 2007, the American Bar Association's (ABA) House of Delegates approved and endorsed the NYSBA's recommendation to eliminate mandatory retirement and to replace it with individual evaluations of senior partners based upon the same performance criteria used to evaluate other lawyers in the firm. Some large firms adopted the recommendations and publicly announced they would discontinue their age caps. Opponents said the ABA should not dictate how firms should handle what amounts to a private contract matter between partners. The *Kelley Drye* case has now brought these issues back into the spotlight.

Considerations for Firms

In a press release, EEOC Acting Chairman Stuart J. Ishimaru stated, "[L]aw firms that single out older attorneys for adverse treatment simply because of their age run great risk of violating the federal prohibition on age discrimination. This lawsuit should serve as a wake-up call for law firms to examine their own practices to ensure they comport with federal law." In addition, regional attorney Elizabeth Grossman in the EEOC's New York office said, "[A] law firm's compensation for its attorneys should be based on ability and productivity, not on age-based stereotypes about declining effectiveness." The New York Law Journal reported that, "the managing partner of Kelley Drye said the firm does not believe the suit is of any merit, 'and we intend to vigorously defend the firm.'"

The Kelley Drye complaint raises difficult issues. It is not clear that it is a challenge to the firm's mandatory retirement policy per se, or it may be a challenge to the firm's reduced compensation policies for former partners who have left the partnership but continue to practice. It raises the question of whether firms can effectively continue to retain such retired partners on a reduced compensation program.

With the EEOC again targeting law firms for their age-based retirement policies, law firms and other professional service firms of all sizes, shapes and structures should take a hard look at their organizational structures, policies and practices regarding older workers.

¹See *Simpson v. Ernst & Young*, 100 F.3d 436 (6th Cir. 1996); *Serapion v. Martinez*, 119 F.3d 982 (1st Cir. 1997); *Ehrlich v. Howe*, 848 F.Supp. 482 (S.D.N.Y. 1994); *Caruso v. Peat, Marwick, Mitchell & Co.*, 717 F. Supp. 218 (S.D.N.Y. 1989); *Wheeler v. Main Hurdman*, 825 F.2d 257 (10th Cir. 1987).

If you have questions or need further information about this Client Alert, please contact:

Devika Kewalramani
dkewalramani@mosessinger.com
212.554.7832

Arnold N. Bressler
abressler@mosessinger.com
212.554.7636

Co-chairs of Moses & Singer's **Legal Ethics & Law Firm Practice**.

David Rabinowitz
drabinowitz@mosessinger.com
212.554.7815

Co-chair of the firm's **Employment and Labor** group.

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The Chrysler Building
405 Lexington Avenue
New York, NY 10174-1299
Tel: 212.554.7800 Fax: 212.554.7700

2200 Fletcher Avenue
Fort Lee, NJ 07024
Tel: 201.363.1210 Fax: 201.363.9210
Abraham Y. Skoff, Esq.
Managing Attorney for New Jersey

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