Out with the old

Proving individual, intentional age discrimination during a reduction in force

By P. Bobby Shukla

Due to the current economic crisis, companies of all sizes are conducting layoffs based on budget cuts. While there are certainly legitimate reasons for reductions in force, it is not unusual for employers to use the opportunity to terminate employees based on an unlawful motive by surreptitiously including them in the layoffs. We often see this with the employee who recently engaged in protected activity, e.g., took maternity leave or medical leave, or complained about unlawful harassment.

Another common scenario is for an employer to use the occasion of a reduction in force to purge its workforce of one or more of its older employees. Older workers are often targeted either because of the age bias that pervades our work cultures or because these employees have the highest salaries due to long-term employment. The law is clear, however, that employers cannot use a reduction in force as an opportunity to discriminate: "[D]ownsizing alone is not necessarily a sufficient explanation, under the FEHA, for the consequent dismissal of [a protected] worker. An employer's freedom to consolidate or reduce its work force, and to eliminate positions in the process, does not mean it may 'use the occasion as a convenient opportunity to get rid of [protected] workers.' [Citations.] Invocation of a right to downsize does not resolve whether the employer had a discriminatory motive for cutting back its work force, or engaged in intentional discrimination when deciding which individual workers to retain and release.") (*Kelly v. Stamps.com, Inc.* (2005) 38 Cal.Rptr.3d 240, 247-248, quoting *Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 358.)

Plaintiffs prove intentional ("disparate treatment") age discrimination by establishing that age was a substantial motivating factor in an adverse employment action. In the context of a reduction in force, this is usually done by showing that the selection criteria used to determine who to terminate and who to retain was discriminatory. Another way to prove age discrimination in a reduction in force is to show that the employer's assertion that your client's job was eliminated is false and that your client was, in fact, replaced by a significantly younger employee (often under a different job title as cover for the action). This article explores issues unique to, or that commonly arise in, individual age discrimination cases in the context of a reduction of force to offer useful tips to the employment law practitioner.

Statistical evidence alone can establish a prima facie case of disparate treatment

Disparate treatment cases have a burden-shifting requirement of proof: the employee presents a prima facie case, the employer presents a nondiscriminatory reason for the adverse action, then the employee shows that the employer's stated reason is pretext for discrimination. (See CACI 2570.) An inference of age discrimination can be established by a showing that those outside of plaintiff's protected class were treated more favorably. (*Diaz v. Eagle Products Ltd.* (9th Cir. 2008) 521 F.3d 1201, 1207.) In the context of a reduction in force, statistical evidence is very helpful in giving rise to an inference of discrimination, especially because the plaintiff may not have been replaced. In a more typical termination circumstance, replacement is common and replacement by a significantly younger employee can raise the inference of age bias. In the absence of a replacement, you need to raise inferences of age bias in other ways.

We often associate the use of statistical evidence with a disparate impact case. A disparate impact case shows that a facially neutral policy adversely impacts a protected group. Unlike disparate treatment, it does not require proof of intent to discriminate and does not employ the same burden-shifting method of proof. Disparate impact cases rely on statistical evidence to establish adverse impact.

Statistics can be just as powerful in disparate treatment cases, especially where there is a reduction in force. The Ninth Circuit has clarified the standard of proof for statistical evidence in disparate treatment cases. In *Schechner v. KPIX-TV and CBS Broadcasting, Inc.* (9th Cir. 2012) 686 F.3d 1018, a FEHA age discrimination case, the court rejected the lower court's holding that statistical analysis presented to prove a prima facie case of disparate treatment age discrimination failed to give rise to an inference of discrimination because the analysis did not account for variables related to the defendant's proffered non-discriminatory reason for the layoffs of older employees. The lower court cited prior Ninth Circuit precedent that held when a plaintiff relies on statistical evidence as the primary support for her prima facie case of age discrimination, "the three-step burden-shifting analysis collapses into a single step." Instead, the appellate court held that a plaintiff can establish a prima facie case of disparate treatment based solely on statistics as long as the statistics show a "stark pattern of discrimination" unexplainable on grounds other than age. The court further held

the statistical evidence does not need to account for the defendant's legitimate nondiscriminatory reason for the discharge.

The two *Schechner* plaintiffs were long-term, decorated on-air journalists in San Francisco who were laid off following a directive by CBS to cut the news station's budget by 10%. The plaintiffs were 66 and 47 years old at the time and were among five journalists who were laid off. The other three journalists were 57, 55 and 51. At trial, plaintiffs presented expert statistical evidence that compared the on-air talent who were laid off with the entire pool of on-air talent for the news station KPIX-TV. The plaintiffs' expert concluded that the individuals laid off as a group were older than those retained and that the disparity between the two groups was statistically significant. Defendant attacked the analysis by stating it failed to account for the stated reason for the layoffs, which was to lay off general assignment reporters, based on the next date of their contract expiration, and to retain specialty reporters. The court found the statistical evidence met the prima facie threshold even though it did not consider contract expiration dates at all.

The holding is useful because reliable statistical evidence showing a stark disparity in a reduction in force may be the only evidence you will need to survive summary judgment. It can further serve you well at trial, presented along with other evidence demonstrating pretext (or falsehoods) regarding the decision to select your client for layoff. Be careful, however, not to let defense counsel confuse or manipulate the differing standards of proof for statistical evidence in treatment versus impact cases. In a disparate impact case, the plaintiff must prove discriminatory impact with statistical evidence; raising an inference of the impact is insufficient. (*Moore v. Hughes Helicopters, Inc.* (9th Cir. 1983) 708 F.2d 475, 482.) In a disparate treatment case, statistical evidence can be used to raise an inference of discrimination.

Salary as impermissible criterion

The use of salary as a criterion for a layoff is of particular import in age cases where there is a reduction in force. This is based on the fact that older employees often have higher salaries than younger ones due to longer-term employment. Staff cuts based on salary is a direct method for a company to get the most cost-savings with the least number of layoffs. A few years following a 1997 decision, which held that the use of high salary as a selection criterion for layoffs does not violate the FEHA's prohibition on age discrimination, the California legislature passed Government Code section 12941, expressly denouncing the holding, stating in full:

> The Legislature hereby declares its rejection of the court of appeal opinion in *Marks v. Local Corp.* (1997) 57 Cal.App.4th 30, and states that the opinion does not affect existing law in any way, including, but not limited to, the law pertaining to disparate treatment. The Legislature declares its intent that the use of salary as the basis for differentiating between employees when terminating employment may be found to constitute age discrimination if use of that criterion adversely impacts older workers as a group, and further declares its intent that the disparate impact theory of proof may be used in claims of age discrimination. The Legislature further reaffirms and declares its intent that the courts interpret the state's statutes prohibiting age discrimination in employment broadly and vigorously, in a manner comparable to prohibitions against sex and race discrimination, and with the goal of not only protecting older workers as individuals, but also of protecting older workers as a group, since they face unique obstacles in the later phases of their careers. Nothing in this section shall limit the affirmative defenses traditionally available in employment discrimination cases including, but not limited to, those set forth in Section 7286.7 of Title 2 of the California Code of Regulations.

While the legislature's proclamation is a powerful one, in the near 20 years since its passing, the statute's applicability is not readily evident to practitioners or courts. There is no doubt that section 12941 codified "the disparate impact theory of proof" in age discrimination cases under the FEHA. Further, its reference to salary being an impermissible criterion where it "adversely impacts" older workers fits the disparate impact model precisely.

For these reasons, defense counsel have used this language to try to argue that the statute is, in fact, limited to disparate impact cases. Yet CACI 2570, the form jury instruction for disparate treatment age discrimination, lists the statute in its sources and authorities as "Disparate Treatment: Layoffs Based on Salary. Government Code section 12941." Also, nothing in the legislative history of the statute limits its application to disparate impact cases. Thus, there is no reason it cannot be utilized in intentional discrimination cases.

A recent case, though not dealing with a reduction in force, instructs on how the consideration of salary in a termination decision may be used to help prove individual age discrimination. In *Corley v. San Bernardino County Fire Protection District*, (2018) 21 Cal.App.5th 390, the plaintiff proposed the following special jury instruction: "The use of salary as the basis for discriminating between employees, when terminating employment, may be found to constitute age discrimination if the use of that criterion adversely impacts older workers as a group."

The defense objected, arguing that the prohibition against using salary as a criterion for layoffs may constitute age discrimination was limited to a disparate impact theory of discrimination. The defense further argued that the instruction was improper because it "effectively tells the jury that replacing an older, higher paid employee with a younger, lower-paid employee is age discrimination." The defense also argued

that it was improper because there was no evidence that the defendant used salary as a basis for discriminating against older employees. The trial court agreed that there was no evidence that the employer discriminated against older workers "as a group" and took out that reference while noting that the statute referred to discrimination against older employees "as individuals" as well. The trial court stated that it believed the jury could consider evidence that the fire district saved money by terminating Corley as a factor in proving that the district discriminated against him as an individual on the basis of age. The court ultimately gave the following instruction: "The use of salary as the basis for differentiating between employees when terminating employment may be a factor used to constitute age discrimination if the use of that criterion adversely impacts older workers."

The plaintiff prevailed at trial and the defense appealed on grounds the instruction constituted reversible error. The appellate court found it need not determine whether Corley presented substantial evidence that warranted giving the instruction because the bulk of the trial evidence pertained to matters other than differences in employee salaries, and, given that the instruction pertained only to a relatively minor portion of the evidence at trial, the potential for prejudicial impact was minimal. The appellate court further noted that in closing, Corley's counsel made clear that the jury should only consider such evidence in determining whether the district discriminated and never suggested the jury could conclude that there was discrimination based solely on salary differential.

The holding in *Corley* informs how a plaintiff in an individual intentional discrimination case could use section 12941's prohibition against salary as a criterion for layoffs where it adversely impacts older workers. It would be prudent to do so with better evidence than it seems was presented in that case to show some adverse impact, e.g., statistical evidence or raw data or "me too" evidence showing other older employees whose salaries were factors in their termination. This evidence could go far in proving intentional discrimination against an individual client in a reduction in force.

Replacement by same age or older worker does not gut your case

Often, employees fired in a reduction in force are not replaced since the purpose of the layoffs is to decrease staff. Where an individual layoff is motivated by discrimination, sometimes an employee is replaced but the employer attempts to hide it by, for example, continuing the role under a different job title and/or in a different department. In those instances, uncovering such facts is key to demonstrating pretext for discrimination.

When you can show that a significantly younger employee has taken over your client's former job duties, the inference of unlawful motive is strong. What if, however, the employer is able to show there was a replacement but that person is older than your client? While it is never a good fact in an age case that your client was replaced by an older employee, in the context of multiple lay-offs, as long as there are other facts that demonstrate age bias against your client and others, you may still prevail both at summary judgment and ultimately at trial.

In *Begnal v. Canfield and Associates* (2000) 78 Cal.App.4th 66, four plaintiffs sued their former employer for age discrimination (their ages ranged from 40 to 64). The company needed to cut staff for financial reasons. There was evidence that three of the plaintiffs were replaced by significantly younger employees and one plaintiff (McKenzie) was replaced by an older employee. At trial, the jury found in favor of all four plaintiffs. Post-verdict, the defendant prevailed on a motion for judgment notwithstanding the verdict with respect to McKenzie on grounds that she was replaced by an older person. Given that fact, the trial court found, as a matter of law, that McKenzie could not have been terminated based on age. McKenzie appealed on grounds that the jury's inference of age discrimination was not precluded by the older replacement because she presented other substantial evidence of discrimination to support the verdict. The Court of Appeal agreed, finding that replacement by an older employee in an age case does not preclude discriminatory inferences. (See also *Douglas v. Anderson* (9th Cir. 1981) 656 F.2d 528, 533 [holding that replacement by an older person in an age discrimination case does not foreclose discriminatory inference if other direct or circumstantial evidence supports the inference].)

The substantial evidence McKenzie presented at trial included: (1) that the company's allegations of her performance issues were false; (2) that most of the new hires after her termination and the termination of the other plaintiffs were substantially younger; (3) an age-based remark by the company's owner; and (4) statistical evidence presented by an expert witness. (Notably, the statistical evidence relied on a small sample group, yet was not rejected by the court.)

Another way you may neutralize facts about an older replacement is to expose it as a decision made in anticipation of litigation. Further, as noted by the court in *Begnal*, if there is evidence that the company's new hires are significantly younger and have reduced the overall age of its employees or any other circumstantial evidence of age discrimination that the jury finds credible, that may resolve any conflict created by evidence of an older replacement. (*Id.* at 617-618.)

Same age or older decision-maker does not gut your case

Another common attempt by the defense to quash any inference of age discrimination is to point out that the decision-maker in a lay-off or termination decision is also an older employee. In

the context of reductions in force, since there are often multiple layoffs, there are also often multiple upper management decision-makers involved. This will make it more likely that at least one of them is the same age or older than your client. This fact, while challenging, does not preclude a finding of discrimination. (*Castaneda v. Partida* (1977) 430 U.S. 482, 499 [Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group."].)

When it comes to race or ethnicity, since there is great diversity within racial and ethnic groups, the seeming fallacy of discriminatory motive against a member of one's own group can often be explained by factors such as regional difference or skin color prejudices. With age, these types of distinctions are harder to find. Nevertheless, explore potential reasons for bias delicately since the origins of discriminatory animus can be complicated, and we are very capable of harboring it against those most similar to ourselves.

We faced this challenge in a recent age discrimination trial against a high school. The stated reason for the termination was a reduction in force and the key decisionmaker (the principal) was in her late 60s, the same age group as our client. To complicate things even further, the principal had eliminated her own position as part of the reduction in force. We were able to explain how the principal could harbor age-based bias by her own deposition testimony. When asked whether she had told our client that our client was "not the future face" of the school, the principal denied it but added, "if I would say that about anyone it would be me." Upon further questioning why she would say that about herself, the principal referenced her age. We were able to use this testimony to show the principal had internalized ageism, i.e., that a woman in her 60s could no longer be a valuable contributor, which she had projected onto our client.

Challenging the "same actor" inference

A common defense argument in a reduction in force, particular with smaller employers, is that there can be no inference of discrimination because the same actor hired and fired your client. "[W]here the same actor is responsible for both the hiring and the firing of a discrimination plaintiff, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory motive." (*Bradley v. Harcourt Brace & Co.* (9th Cir. 1996) 104 F.3d 267, 270-271.) In these instances, a plaintiff must present stronger evidence of bias to overcome the inference of no discriminatory bias. (*Coghlan v. American Seafoods Co., LLC* (9th Cir. 2005) 413 F.3d 1090, 1096.)

The inference may be overcome if you can demonstrate performance ratings that contributed to the hiring decision, or other positive personnel decisions, were not made solely by the firing manager. In other words, if other managers contributed to the hiring process, you can effectively dilute the same actor inference. (See *Juell v. Forest Pharmaceuticals, Inc.* (E.D. Cal. 2006) 456 F. Supp.2d 1141 [no same actor inference – even though the firing supervisor participated in recommending the plaintiff for a promotion and gave him positive reviews, raises, and bonuses – because plaintiff showed that the promotion was based on ratings over the course of years that included evaluations by another supervisor].) A change in circumstances can also overcome the same actor inference in an age case. (See also *Johnson v. Group Health Plans, Inc.* (8th Cir. 1993) 994 F.2d 543, 548 [defendant could not rely on the same actor inference to raise inference of no age discrimination where the same person who hired plaintiff needed her experience during a transition period but no longer needed it after that period ended when plaintiff was fired].)

Conclusion

Do not let the challenges of proving unlawful age discrimination in the context of a reduction in force deter you. There are always opportunities for a diligent, tenacious, and creative lawyer to marshal evidence to overcome inferences that seem arrayed against a worthy and deserving plaintiff.


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