

How to Generate an Age Discrimination Case

Most employers are aware that there are some common sense rules that can help them avoid a discrimination lawsuit. These rules include making decisions affecting employees on the basis of non-discriminatory, business-related reasons, being consistent in explaining the basis for decisions that are made, and, certainly, avoiding any statements that are *per se* discriminatory. While following these guidelines will not prevent a discriminatory claim from being asserted, such a course of action will make it easier to defend against such claims.

An age discrimination case involving National American University (NAU), decided last summer, is instructive because it aptly demonstrates how *not to* handle a personnel decision. *Jones v. National American University*, No. 09-3007 (8th Cir. Jun. 23, 2010). In 2004, NAU decided to fill a vacant director of admissions position. Jones, then 56 years old and an admissions representative at NAU, applied for the position. One job announcement stated that three years of postsecondary recruiting experience was required; another announcement indicated that this experience was merely preferred. Neither mentioned management experience as a qualification, though apparently it was NAU's practice to require this experience for these kinds of positions. The position was offered to three applicants, two of them in their 30's and one of them lacking any recruitment experience. The third applicant (Beck), a 34 year old associate hospital administrator with no significant management experience, accepted. Jones resigned and sued NAU in federal district court for age discrimination, after filing an EEOC claim.

In her suit, Jones testified the NAU president told her that she would have been a better short-term choice but that Beck would be better long-term, a statement she argued implied a bias against her because of her age. She further testified that he had commented to her, with respect to another applicant in his mid-50's, that NAU did not need a "grandpa working with our high school students." NAU, in its response to the EEOC charge, asserted that Jones had not been hired due to her deficient performance. At trial, however, NAU changed its position and offered Jones' lack of management experience as the reason she was not promoted. Jones countered with evidence disputing both reasons. She showed she had consistently received favorable performance reviews and that management experience was not required of the successful candidate, Beck.

After a trial, the jury awarded Jones \$35,000 plus attorneys' fees (the damages were doubled based on a finding of willful discrimination by NAU). On appeal, the U.S. Eighth Circuit Court of Appeals affirmed this verdict and the trial court's rulings. While NAU argued that it had presented a nondiscriminatory basis for its decision not to promote Jones (her lack of management experience), the appellate court found that this reason was shown to be pretextual by Jones' evidence. The court noted, in particular, the age-based comments by NAU, the fact that it had offered two conflicting explanations to justify her non-selection for the position, and the fact that she was better qualified than Beck and the other applicants who were offered the position.

NAU found itself having to bear the burden of the expense and inconvenience of having to defend these charges at trial and on appeal, as well as the cost of paying the judgment and

Jones' attorneys' fees (which may have been much more than the amount of the judgment). The sad lesson is that this all quite possibly could have been avoided if its administrators had followed sound, enlightened personnel practice in filling the director's position. That is the lesson of the *Jones* case for other universities.