

NEWSSTAND

Court Declines to Apply 'Bona Fide Executive' Exception to Former In-House Counsel

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Certain companies have mandatory retirement policies that apply to senior executives who meet the requirements of the “bona fide executive” exemption under the Age Discrimination in Employment Act (“ADEA”). A recent federal court decision makes clear, however, that employers seeking to utilize that exemption must satisfy a high standard of proof. The court declined to apply that exemption to a former in-house counsel and instead concluded that the company violated ADEA by forcing the retirement of its in-house attorney. *Raymond v. Boehringer Ingelheim Pharmaceuticals, Inc.*, No. 3:06-cv-1362 (D. Conn. Aug. 27, 2009).

Although ADEA does not prohibit voluntary retirement programs, policies that force individuals to retire must come within the recognized “bona fide executive” exemption in order to avoid creating liability. 29 U.S.C. § 631(c)(1). An employer may require an employee to relinquish his/her position if the employee: (1) is sixty-five or older; (2) was a “bona fide executive” or in a “high policymaking” position for the two years prior to retiring, and; (3) is entitled to collect an immediate, nonforfeitable retirement benefit of at least \$44,000 annually. This exception is narrowly construed and, pursuant to federal regulations, the employer bears the burden of establishing each element with clear and unmistakable evidence. 29 C.F.R. § 1625.12(b).

Factual Background

In *Boehringer*, the company required its executives to retire once they reached the age of sixty-five. In 1994, Dr. Robert Raymond joined *Boehringer* as its Chief Patent Counsel when he was fifty-five years old. As Chief Patent Counsel, Raymond managed the patent law group and reported directly to *Boehringer*’s General Counsel. On October 1, 2002, the same month that Raymond turned sixty-three, *Boehringer* promoted him to Vice President of Intellectual Property. Raymond’s responsibilities did not increase as a result of the promotion. In August 2003, *Boehringer* hired Michael Morris as a patent attorney. Immediately, Morris assumed most of Raymond’s managerial responsibilities and Raymond’s direct reports began reporting to Morris. In 2004, Raymond had a limited managerial role and concentrated primarily on patent litigation for *Boehringer*. Also in 2004, *Boehringer*’s general counsel referred to Morris as the “de facto head of the department.”

In September 2004, *Boehringer* informed Raymond that he was expected to retire when he turned sixty-five pursuant to its mandatory retirement policy. Raymond was not previously aware of *Boehringer*’s policy and objected to the legality of the policy and its application to him. Despite Raymond’s objections, he retired on October 31, 2004, two days after he turned sixty five. Raymond subsequently commenced a lawsuit in the United States District Court for the District of Connecticut, asserting that *Boehringer*’s mandatory retirement policy violated ADEA.

The Court's Decision

The district court concluded that Boehringer failed to establish by “clear and unmistakable proof” that Raymond was a bona fide executive or high policymaker for the two years prior to his retirement because Morris assumed all of Raymond’s managerial responsibilities well before Raymond’s departure. Moreover, in order to qualify as a high policymaker, an employee must have significant corporate influence or access to top decision makers when advocating corporate policy. Although Raymond did obtain patents for Boehringer, and this was integral to the company’s core mission, the court did not find this argument persuasive, stating that it is “the type of function that the employee performs, and not the importance of that function” that determines whether an employee is a high policymaker. Even before Morris took over the bulk of Raymond’s duties, Raymond’s only contact with corporate executives was to provide legal advice and not to develop corporate policy.

The court similarly rejected Boehringer’s argument that Raymond was a bona fide executive. A bona fide executive is a top level employee who exercises substantial executive authority over a significant number of employees and a large volume of business. During the last year of his employment at Boehringer, Raymond played a minimal role in hiring and firing decisions, even in his own department, and supervised only one direct report. As Raymond was not eligible for either exception, the court concluded that Boehringer violated ADEA. However, the Court did not award Raymond damages because it concluded that he failed to mitigate his damages by actively looking for a new position following his termination.

Lessons for Employers

While mandatory retirement policies are useful for employers seeking to refresh upper management, companies must be cognizant that courts strictly construe the mandatory retirement exception to ADEA. An employer should scrutinize its policy to ensure that it satisfies each element of the exception. Specifically, employers should evaluate each employee on an individual basis to determine whether that employee’s duties qualify him or her as a high policymaker or a bona fide executive; simply providing an employee with an executive job title is insufficient. In addition, if an employee holds two positions in the two-year period before retirement, each position must qualify as a bona fide executive or high policymaking position in order to satisfy the exception.

Finally, although not at issue in this case, employers must also ensure that the retirement benefit includes only benefits from a pension, profit-sharing, savings or deferred compensation plan; benefits from health insurance or life insurance plans, social security, contributions by prior employers, and employee contributions are excluded.