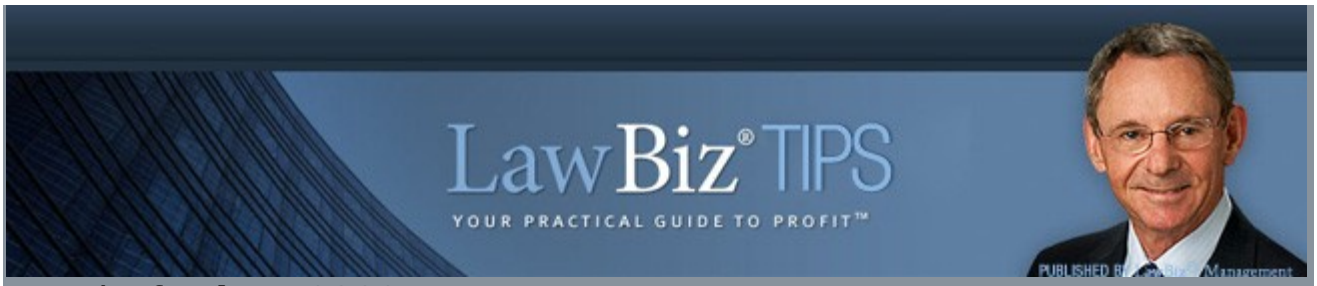

Week of **July 7, 2009**

Can Age Discrimination Be Proved?

The U.S. Supreme Court has again "made law," and it has direct implications for lawyers who have been de-equitized or laid off. The Court, in its 5-4 decision in the case Gross v. FBL Financial Services, Inc., said that the burden of proving age discrimination lies solely with the plaintiff. In previous cases, the plaintiff merely had to prove that age was a factor, and then the employer had to show that there were legitimate reasons for the termination. How will plaintiffs be able to show that age was the primary factor? After all, the plaintiff was not in the room when the decision to terminate was made.

Law firms are not exempt from the requirements to have a workplace free from discrimination. But the Gross ruling suggests that older partners who have been terminated or demoted will have little foundation to claim discriminatory intent on the basis of age. In many firms, there is a direct relationship between de-equitization and leverage: letting go of older partners who have higher rates but bring in less business, while hiring and using young associates to do billable work, who have more profitability and potential rainmaking skills. With this business reason, age discrimination would be hard to prove.

There have already been successful age discrimination actions against law firms. In the most highly publicized one several years ago, the EEOC accused Sidley Austin of firing a group of older lawyers strictly on the basis of their age. The firm contended that its action was based on decreased productivity, but still agreed to a reported $27 million settlement with the dismissed lawyers. The Gross ruling could mean a different outcome if the firm could demonstrate that hours billed, origination credits, or a similar criterion entered into the decision-making.

Age as a sole factor in termination is difficult to prove. Aging

lawyers or lawyers committed to exiting their practices may emotionally leave their clients long before their retirement date, resulting in the kind of less effective representation that causes malpractice suits and disciplinary action, and incompetent lawyers do not enjoy protected status at any firm. But in either case, the issue is professional performance as much as age.

Is there a way to handle the dilemma more humanely? One firm, Wilmer Hale, has been among the many that have asked more senior lawyers to seek employment elsewhere. But this is actually a part of a career-counseling program that the firm has had for several years that involves a series of mentoring meetings with underperforming older lawyers to tell them whether they are meeting firm performance standards, and to give them opportunities to upgrade their skills or prepare them for departure. Taking such a measured approach is ultimately best for all concerned - after all, who really wants a discrimination lawsuit, even if you win it? And who wants to deliver the third most devastating news a proud and well-educated lawyer can hear?

Personal Commentary

Last week, I talked about competition among sole and small firm practitioners and new sole practitioners from Big Law. Today, I received a call from just such a person, having left Big Law in April, wanting my help to set up a new office and move forward as a new sole practitioner. He didn't even know the right questions to ask to see if I could help him. He wants a checklist of sorts to learn what questions should be asked. BTW, those checklists are in my books, but he won't take the time to read them. That's the person who needs my help more than he knows. Do you know such people? Tell them to get out their credit card or checkbook and call me. That investment in themselves will pay for itself many times over, and quickly!

Best wishes,

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