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CLIENT ALERT: Massachusetts Appeals Court Decision Reminds Employers That Succession Planning Must Be Handled With Care

There is no doubt that employers have a legitimate interest in succession planning. However, a recent Massachusetts Appeals Court decision underscores the importance of utilizing and communicating age-neutral criteria when engaging in succession planning or preparing for a reduction-in-force. In *Adams v. Schneider Electric USA*, the Appeals Court found that a reasonable jury could determine that the plaintiff – a 54-year old who was separated through a reduction-in-force – may have been subjected to age discrimination based on a finding that the reduction-in-force was tainted as a whole or that the decision-maker for the plaintiff's selection relied upon management's discriminatory animus. The Appeals Court particularly focused on a number of emails exchanged by the company's leaders after the reduction-in-force, including some which described the company's need for "age diversity" and to make room to recruit "young talent."

In *Adams*, the employer argued that the 24-person reduction-in-force was age-neutral because: it had been based purely on costs; many employees over the age of 40 had retained their employment; and no younger employees had actually been hired following the layoff. Notwithstanding the employer's arguments, the Appeals Court decided that based, in large part, on the above-mentioned emails, a jury could infer the existence of "a pervasive and explicit corporate strategy to terminate some older workers to make room to hire younger workers." Even though the emails were not from the actual decision makers, the Appeals Court noted they were from company leaders who had power to make employment decisions and could not be disregarded as stray remarks. The Appeals Court was similarly unaffected by the fact that most of the emails at issue occurred after the reduction-in-force, holding that "[r]emarks after the adverse employment action can still be relevant to the employer's contemporaneous thinking." Instead, the Appeals Court, when viewing the emails as a whole, determined that "[t]he company's ageist remarks were persistent, pervasive, and material to whether the decision to conduct an RIF was itself tainted."

The Appeals Court was also undeterred by the employer's retention of older workers through the reduction-in-force and the fact that it had not yet hired any younger workers since that time. Instead, the Appeals Court explained that the question for the jury was whether the plaintiff's own selection was motivated by age and not whether other older workers may not have similarly been impacted. It further held that "[w]hile the company might not yet have hired the younger workers at the time of suit, if it cleared out the older workers to set the foundation for its plan, that would be sufficient discriminatory animus to permit a finding of liability."

The *Adams* decision serves as a strong reminder to employers that reductions-in-force and succession planning must be based on age-neutral criteria. Perhaps even more importantly, it serves as a cautionary tale about how they must be handled with care. As this case demonstrates, an employer's ability to defend its age-neutral criteria can be severely jeopardized by internal communications from

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business leaders that provide any potential inference that age may have been a factor in the company's decisions – even if those communications occur after the decisions are made.

Employers are encouraged to contact their MBJ attorney with any questions about succession planning, reductions-in-force or any of the other issues addressed herein.

Sean P. O'Connor and Brendan T. Sweeney are attorneys with Morgan, Brown & Joy, LLP, and may be reached at (617) 523-6666, or at soconnor@morganbrown.com or bsweeney@morganbrown.com. Morgan, Brown & Joy, LLP focuses exclusively on representing employers in employment and labor matters.

This alert was prepared on August 29, 2022.

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