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Pursuant to the decision, employers seeking waivers of Age Discrimination in Employment Act (ADEA) claims in accordance with the Older Workers' Benefit Protection Act (OWBPA) must clearly explain why layoff selections were made. Littler breaks down the case.

I Don't Know Why They Picked Me: 10th Circuit Broadens Requirements For Waiving Age Discrimination Claims

By Nancy N. Delogu and Gary D. Shapiro

UPDATED July 19, 2006 *Kruchowski v. Weyerhaeuser Co.*, 423 F.3d 1139 (10th Cir. 2005), withdrawn, and superseded with *Kruchowski v. Weyerhaeuser Co.*, 446 F.3d 1090 (10th Cir. 2006). Although the surviving opinion is largely the same as the original, the portion discussing eligibility factors has been wholly excised.

Employers' historical understanding of what they must communicate to employees asked to release age discrimination claims may be fatally insufficient, following a recent decision from the U.S. Court of Appeals for the Tenth Circuit. Employers seeking waivers of Age Discrimination in Employment Act (ADEA) claims in accordance with the Older Workers' Benefit Protection Act (OWBPA) now must clearly explain not only who has been selected for layoff, but *why* selections were made.

Reading the OWBPA requirements closely, the court in *Kruchowski v. Weyerhauser*, No. 04-7118 (September 13, 2005), concluded that the company failed to provide sufficiently personalized notice to employees of its reasons for choosing them in its reduction-in-force (RIF), and that the waiver was therefore invalid. The court's ruling permits the 16 plaintiffs (more than half of the total number of employees laid off) to pursue age discrimination claims against their former employer.

A Simple Reduction-in-Force?

The plaintiffs were employees of Weyerhaeuser laid off pursuant to a RIF. At the time they were notified of the RIF, affected employees received a letter from the Mill Manager and a Group Termination Notification, which identified by job title and age the employees selected for termination and eligible for severance pay. The notice also identified employees by job title and age who were not eligible to receive severance pay because they had not been selected for termination.

After the termination, the company mailed each of its former employees a package containing a Release of Claims (Release) which included a waiver of age discrimination claims. The plaintiffs signed the Releases and returned them to the company.

I Agree. Now, Can I Take It Back?

After signing the releases, the plaintiffs sued Weyerhauser in U.S. District Court for age discrimination under the ADEA. Of particular importance, they claimed that the Release failed to satisfy the requirements of the OWBPA, and was therefore void. The district court agreed with the company that its release satisfied the statute's requirements, concluding that the Release was a product of a knowing and voluntary waiver, made without fraud, coercion, duress, or mistake, and made with the opportunity and time to consider and to seek the advice

of counsel. The district court granted the company summary judgment and the plaintiffs appealed.

The Tenth Circuit reversed.

Why Me? Was It Something I Did?

On appeal, the plaintiffs again argued that the group notice provided to them about the decisional unit – the class, unit, or group of persons considered for termination – was insufficiently personal or specific. To comply with the OWBPA, they argued, Weyerhaeuser was required to describe the contours of the decisional unit, as well as any "eligibility factors," to the terminated employees so they could consider carefully whether to waive their rights under the ADEA.

Weyerhaeuser defended its notice, arguing it had communicated its "eligibility factors" to the employees when it informed them that the RIF was limited to certain salaried employees at the Mill. The court rejected the argument that an employer may comply with the OWBPA by simply identifying the employees in the decisional unit and then indicating, without reason, who among them would be eligible for severance (in exchange for a release) and who would not. In support of its reasoning, the court cited the Supreme Court's decision in *Oubre v. Entergy Operations*, which held that the OWBPA is "designed to protect the rights and benefits of older workers...[and therefore it] imposes specific requirements for releases involving ADEA claims." The court held that to fulfill its obligations under *Oubre*, an employer must provide an individualized, detailed explanation of why it chose each particular employee. Absent this information, the waiver cannot be considered knowing and voluntary.

In the course of the litigation, Weyerhauser explained that it considered each employee's leadership abilities, technical skills, and behavior, and whether each employee's skills matched its business needs, to arrive at a list of employees who would be laid off. The company admitted, however, that it failed to provide this information to the plaintiffs before they made their decision to sign the Release. The court held that this failure contravened the statute's goal of alerting affected employees of potential age-discrimination claims. Because the information Weyerhaeuser provided did not meet "the strict and unqualified requirement of the OWBPA," the court deemed the Release ineffective as a matter of law.

Modifying ADEA Releases to Comply with OWBPA

Although the decision binds only the district courts falling within the Tenth Circuit (Oklahoma, Kansas, New Mexico, Colorado, Wyoming, and Utah), it is the first U.S. Circuit Court of Appeals to consider the issue, and probably will be given deference by federal courts nationwide.

All employers should review their existing practice with respect to OWBPA notices, and ensure that they provide outgoing employees with sufficient information to knowingly and voluntarily release an age discrimination claim. Providing the reasons for a layoff will be straightforward when, for example, the employer is closing a location. It will inevitably be more difficult, however, to notify employees that their termination has been motivated by a review of performance factors without exacerbating an already tense situation. Nevertheless, supplying specific, detailed reasons for making these employment decisions is the surest way to obtain a valid release of age discrimination claims. Because each case is unique, employers should consult with counsel before providing OWBPA notices to employees from whom they intend to obtain releases.

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