



UNIVERSITY
OF KENTUCKY

Office of the Chancellor
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LEXINGTON, KENTUCKY 40506-0032


FAX (606) 258-1062

February 20, 1991

March 1, 1991

MEMORANDUM

TO: Vice Chancellors, Deans,
Directors

FROM: Robert Hemenway 

The attached letter from Legal
Counsel should help us to avoid age
discrimination. Please read and bring
up any questions at a future Dean's
Council.

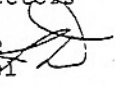
c: Chairs

Attachment

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MEMORANDUM

TO: Chancellors
Vice Presidents
Community College Presidents
Deans and Directors

FROM: John C. Darsie 
General Counsel

SUBJECT: Age Discrimination

There has been, for about three years now, a rather steady increase in the number of age discrimination claims made against universities nationwide. Age discrimination is wrong, it violates University policy and it is illegal. Claims of age discrimination are frequently disruptive and costly to the institution. Yet some University administrators may not have a clear idea what conduct is prohibited. Thus we are offering some advice that may help avoid these claims.

Both Federal and State laws prohibit age discrimination in employment, which means the use of age as a factor in employment decisions, including hiring, firing, promoting, compensating and disciplining employees. Persons aged forty and above are protected by these laws.

The following are some practical tips on how to avoid claims of age discrimination.

1. Do not use age as a factor in making employment-related decisions. This includes decisions concerning hiring, compensation, fringe benefits, allocation of salary increases, job assignments, promotions, discipline and discharge.

2. Do not use age-related terms or phrases in dealing with your faculty or staff. For example, do not refer to an employee as the "elder statesman" of the department, even if you intend it as a term of honor or endearment. Likewise,

do not make or partake in jokes about an employee's age. Any terms that have age-based connotations could be construed by a court, a jury, or a government agency to be "smoking gun" evidence of age-based discrimination.

3. Do not use terms or phrases that have age-related implications in discussing or documenting your reasons for recommending an employment decision. Courts have allowed seemingly unbiased expressions such as the following to be considered as evidence of age discrimination: "eligible for retirement," "need new blood," "want to get rid of more highly paid employees," "desire to encourage up and coming employees," "looking for a fresh face," and "want leadership into the next century." In a case with which I am personally familiar, a supervisor's joking comment that "we need to get rid of all these old biddies" came back to haunt him 20 years later.

4. Do not expect or ask an employee to retire at what some people may believe to be the "normal" retirement age. Although age 65 is currently the benchmark retirement age for purposes of determining certain retirement benefits and services, an employee aged 40 or older may not be compelled to retire based on his/her age. The only relevant exception to the rule against coerced retirements is that the University may require tenured faculty (only) to retire at age 70 until at least December 31, 1993. Generally-applicable retirement incentive programs, such as the University's Early Retirement Incentive Program for faculty, are permissible, so long as there is no coercion to enter the programs. It is entirely appropriate to conduct retirement planning seminars for employees.

5. In making employment decisions, do use factors based upon legitimate business or academic reasons. The factors should be applied consistently and uniformly. For example, if salary increases for faculty are to be based on merit, you should use essentially the same criteria for all faculty members in assessing the job performance of those faculty members for purposes of determining "merit."

6. Do the same type of candid and thorough job-related evaluation of performance, with constructive comments, for all employees regardless of age. Communicate your expectations and evaluation to each employee in writing (even if also orally), so that the legitimate bases for your decisions are clear and any allegations of unlawful discrimination can be disproved.

As noted above, the potential risks and exposure associated with age discrimination lawsuits are substantial.

A prevailing plaintiff may be awarded reinstatement to his/her prior job, promotions, lost wages, interest and reimbursement for his/her attorney's fees and costs of suit. In addition, upon a finding of a willful violation of the federal age discrimination law, the University could be ordered to pay the plaintiff double the amount of his/her lost wages.

* * *

Please communicate these suggestions (which also apply in large part to other forms of discrimination) to all supervisors, faculty search committees and others who are involved in hiring, evaluating, disciplining or otherwise setting the employment terms of faculty or staff. We hope you will discuss this matter with your unit to underscore its importance.

If you have questions, please contact this office.

2241