

Ask the Lawyer - Neil McPhie

Q:

I'm 47 years old. I've been with my agency for 15 years, and I just got passed over for a promotion by someone far younger than me and with much less experience. What can I do?

A:

According to the Office of Personnel Management, 72 percent of full-time, permanent federal employees were at least 40 years of age in 2010. The Age Discrimination in Employment Act (ADEA) shields these employees 40 years of age and older from employers' refusal to hire or promote them because of their age.

As baby boomers get older, age discrimination is becoming more prevalent in the federal workplace. In the 2010 fiscal year, federal employees filed 1,125 Equal Employment Opportunity (EEO) age discrimination complaints over promotion or non-selection, according to an Equal Employment Opportunity Commission (EEOC) report.

Your situation sounds similar to that of many other older federal employees. For example, the EEOC case of *Klein v. Dep't of Agriculture* (2009) involved a 63-year-old Department of Agriculture risk management specialist, William L. Klein, who was not selected for a promotion as a supervisory risk management specialist. Instead of promoting Klein, who had 12 years of relevant supervisory experience, the agency selected a younger candidate with less than two years of relevant supervisory experience.

Klein filed an EEO complaint with his agency, which gave a nondiscriminatory reason for its action. On appeal, however, the EEOC found Klein succeeded in raising an apparent case of age discrimination and the agency "failed to set forth, with sufficient clarity, reasons for complainants' nonselection." After Klein established that he was protected by the ADEA, that he was one of 10 people in the running for the position and that someone under 40 was chosen over him, the EEOC explained that the burden shifted to the agency to further support its nondiscriminatory explanation.

The agency's selecting official explained that the younger person was the "best candidate" and "very impressive," but the EEOC found Klein to be the better qualified candidate. Further, it said the selecting officer's use of broad terms to describe the younger candidate did not satisfy its burden of providing a legitimate, nondiscriminatory explanation for the personnel action. Consequently, the EEOC ordered the agency to promote Klein to the supervisory risk management specialist position.

Federal employees subjected to age discrimination should immediately consult with a federal employment law attorney.

Neil McPhie is the Virginia Managing Partner for Tully Rinckey PLLC and the former chairman of the U.S. Merit Systems Protection Board. He concentrates his practice in federal sector employment and labor law and can be reached at nmcphie@fedattorney.com. To schedule a

meeting with an attorney call 202-787-1900.