

8 PJI 3.2 | ADEA | BONA FIDE SENIORITY SYSTEM

If you find that [plaintiff] has established by a preponderance of the evidence that [defendant] [describe employment action] because of [plaintiff's] age, then you must consider [defendant's] defense that it was applying the terms of a good faith seniority system. An employer can lawfully use a seniority system in making employment decisions unless the seniority rules were designed and used to discriminate against older workers. Put another way, if the seniority rules are legitimate and not designed to discriminate, then the rules are lawful and can be used to make employment decisions.

To establish the defense of a good faith seniority system, [defendant] must prove both of the following by a preponderance of the evidence:

First: That the seniority system used the length of service of employees, and not the age of the employees, as the primary basis for giving available job opportunities to its workers.

Second: That [defendant's] [challenged employment action] was consistent with its seniority system.

If you find that [defendant] has proved these two elements by a preponderance of the evidence, then you must find for [defendant].

COMMENT

The ADEA permits disparate treatment "to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this Act, except that no such seniority system shall require or permit the involuntary retirement of any individual... because of the age of such individual." 29 U.S.C. § 623(f)(2)(A). Thus the seniority system will be invalid if it is dependent on age rather than seniority. See also *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 616 (1993) (rejecting a claim of age discrimination to the extent the challenged employment practice was based on the plaintiff's seniority not his age).

The Supreme Court has held that challenges to the effects of bona fide seniority systems may not be based upon assertions of disparate impact; rather, a plaintiff must prove intentional discrimination. See *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 352-56 (1977). See also *Hiatt v. Union Pacific R.R.*, 65 F.3d 838, 842 (10th Cir. 1995) (challenges of age



discrimination to bona fide seniority systems must rest upon claim of disparate treatment rather than disparate impact).

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