LegalTimes.com

Back to Article

D.C. Firms Keeping Close Eye on Sidley Case

Nathan Carlile

03-12-2007

It was still two years before her 65th birthday, but Pauline Schneider was planning accordingly.

For Schneider, a public finance transactions lawyer at Hunton & Williams, an uncomfortable reality had been pushed on her by the firm: 65 is the mandatory retirement age. No exceptions.

But Schneider wasn't remotely interested in handing over her BlackBerry. At 63, and after 21 years with the firm, she says her practice had never been stronger. Her skills never sharper. And so she started listening to what the headhunters calling her office were selling.

Among the firms recruiting her, two stood out: Orrick, Herrington & Sutcliffe (where she now practices) for its renowned public finance group; and Sidley Austin, for its top-flight bench of lawyers — and the still-pending age-discrimination lawsuit brought by the Equal Employment Opportunity Commission.

"They assured me that despite the suit, they had no mandatory retirement age and pointed to several lawyers at the firm who were still practicing," Schneider says.

That Schneider was approached by Sidley may seem counterintuitive. But it's also an indication that the firm's muddled retirement policy and ugly legal battle is a signpost of the legal industry at a crossroads. Unlike corporate America, most large firms have a mandatory retirement age (when lawyers either retire, or de-equitize, forfeiting financial stake in the firm) that is colliding with aging baby boom-era partners, many of whom are healthy, vibrant, and wanting to work later in life.

And the Sidley suit, potentially a legal Hurricane Katrina, is forcing firms to reconsider mandatory retirement age policies and partnership agreements.

"Retirement plans are probably the biggest issue law firms face today," says Leslie Corwin, an employment partner at Greenberg Traurig who specializes in counseling law firm partnerships. "When I entered the legal profession, 65 was the buzz age for retirement. But now some of the biggest rainmakers are close to 70."

The EEOC alleges that decision-making power at Sidley Austin rests with a few partners on a self-perpetuating executive committee, neutering the rest of the partnership and, in effect, demoting them to employees of the firm. That would make Sidley Austin subject to federal civil-rights actions by employees who claim discrimination.

Last year, the consulting firm Altman Weil published a survey reporting that 57 percent of firms in the United States with 100 lawyers or more have a mandatory retirement age, ranging from 62 to 72.

The EEOC's suit, filed in the U.S. District Court in Chicago in 2005, charges that Sidley Austin discriminated based on age when it demoted or forced the retirement of 32 partners in 2000 after its merger with New York's Brown & Wood. Virtually all of the lawyers were over 40 (triggering coverage under federal civil-rights laws) and downgraded involuntarily because of their age.

"If there's a lesson to be learned from this case, it's that no sector of the economy, whether the factory floor or the offices of the most prestigious law firms, is exempt from the reach of the employment laws," said John Hendrickson, the EEOC's regional attorney in Chicago, at the time the suit was filed.

At the moment the case remains tied up in discovery battles without a trial date. But one possibly significant ruling was already rendered when Judge Richard Posner of the U.S. Court of Appeals for the 7th Circuit ruled that the lawyers could be considered employees, enabling the EEOC investigation to continue with subpoena power.

That ruling, say employment lawyers, could open a previously unavailable litigation course for partners with discrimination claims based on age, race, gender, or handicap.

“Law firms, by and large, have been mostly unaccountable,” says Lynne Bernabei, an employment lawyer who heads the D.C.-based Bernabei Law Firm. But the real legal precedent wouldn’t arrive unless Sidley were held liable. Says Bernabei: “It’s the beginning of law firms having to make sure their employment practices comply with anti-discriminatory laws.”

FORCED RETIREMENT

Forced retirement is an uncomfortable exercise, partly because it can appear to have all the sensitivity of chucking a sea captain off the stern, mid-mutiny. Conversely, having a policy also provides an easy out: it’s not you, it’s the rules.

“Most firms with mandatory retirement will tell you there’s individual exceptions,” says James Jones, a consultant at Hildebrandt International. “It’s a very awkward thing. But the problem is if you begin making exceptions you might as well get rid of it.”

Examples abound: The most obvious horror story is that of Harvey Miller, who built Weil, Gotshal & Manges from the floorboards up, only to leave in 2003 because of mandatory retirement — and then returned to the firm last week as a contract partner. And last November, Michael Sohn, 65, was forced to step down as chairman of Arnold & Porter after a 10-year run because of the firm’s mandatory retirement for leadership positions.

The Sidley case arrives when the baby-boom talent glut has already exacerbated the friction firms feel between keeping aging, yet productive partners and pushing work and clients down to the next generation.

How firms handle retirement varies wildly. Some, like Hunton; Simpson, Thacher & Bartlett; and McDermott Will & Emery, have an inflexible mandatory retirement that requires partners to de-equitize at a set age. They can keep practicing, but without the same workload or compensation. This, proponents argue, forces clients and work down to younger partners, engendering future success.

But there are signs of change. McDermott’s co-partner-in-charge of the D.C. office, Timothy Waters, says of the firm’s retirement rule: “It’s an embarrassment to the firm to lose someone. That hasn’t happened. But I’m trying to encourage my colleagues to consider changing the rule so that doesn’t happen.”

Others are splitting the difference. Firms like Dickstein Shapiro, Arnold & Porter, Crowell & Moring, and Howrey have retirement ages in their partnership agreements that the firms say are flexible. At the specified age, partners may be reviewed and encouraged to decrease their workload and earnings. But there is latitude given if a partner wants to keep up the pace. “What we have is an agreement that partners can remain as partners at 65, and it is their choice to choose their status between 65 and 70,” says Michael Nannes, Dickstein’s chairman. “If a person wants to continue as partner longer that might happen, but no one has done it.”

Firms like Wiley Rein and Hogan & Hartson, which don’t have mandatory retirement ages, say that while a need for new blood in a firm’s partnership is paramount, there’s a more important bottom line. “I’m very familiar with everyone’s performance,” says Richard Wiley, who at 70 is the managing partner of Wiley Rein. “I’m less familiar with how old they are.”

Hogan had a mandatory retirement age until 2002, a change J. Warren Gorrell Jr., the firm’s chairman, says was not spurred by Sidley’s case. “Getting rid of it had to do with the fact that partners can be very productive and valuable past any arbitrary age one might pick,” Gorrell says.

However, examples of a gathering storm are everywhere.

Two weeks ago, Chicago’s Mayer, Brown, Rowe & Maw announced the termination — or the “de-equitization” — of 45 of its partners. Mayer says in a statement the move was done “in full accordance with all applicable legal standards” and that the firm has “not engaged in discrimination of any type.” But try as Mayer, Brown might, the inevitable comparisons to the Sidley case were swift. (It remains unclear how many of the former Mayer, Brown partners are older than 40, but likely most, if not all, are.)

Last week, Sukhan Kim, a Washington attorney, filed suit in the U.S. District Court for the District of Columbia alleging that he was **fired by Akin Gump Strauss Hauer & Feld because of his age**. Similar to the Sidley case, Kim is saying the decision for his termination had less to do with performance than age.

Across the Atlantic, England adopted age-discrimination laws and made them applicable to law firm partnerships last October. There remains a loophole exempting firms founded outside England, though that is expected to close.

And ever progressive, a special committee of the New York State Bar Association in January recommended the abolishment of mandatory retirement policies and said it would lobby firms for change.

GOING CORPORATE

As with Mayer, Brown, however, law firms still need to be able to dump unproductive partners without triggering an age-discrimination claim every time the ax falls. The Sidley case could force firms, long flirting with the emulation of corporate structure, to completely embrace the model.

Greenberg's Corwin says that a clearly defined partnership agreement is the answer. "You can put in a guillotine method — meaning a managing partner or management committee can terminate any partner without a vote — as long as it's in the partnership," says Corwin.

But many firms are spinning their partnership as being just the opposite, portraying decision-making as democratic, in part to differentiate from Sidley Austin.

Most major law firm partnerships don't vote on every decision. So it is stressed that the power a management committee has (which, depending on the firm, will make decisions on compensation, hiring, and firing) is mitigated by turnover through annual elections. So, if a firm isn't a true democracy, it's at least a Madisonian representative democracy, which managing partners hope will keep away the EEOC's ire.

But because it's bad business not to prevent lawsuits, employment lawyers say firms will be best protected from discriminatory claims by becoming more corporate: performance evaluations, formalized standards, and documentation will become more common as a way of legally defending the purging of partnership ranks.

Making partners feel, and appear, more like employees.

"Ironically, a decision that is more adverse to Sidley will spur on and encourage the development of corporate policies," says Philip Berkowitz, an employment lawyer at Nixon Peabody. "Everyone is watching the case and, as a general matter, firms are being more careful."

*Nathan Carlile can be contacted **ncarlile@alm.com**.*