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## Ruling Could Boost Age Discrimination Claims

A ruling by the U.S. Supreme Court has exposed employers to dangers of “me too” testimony in age discrimination cases. Now that older workers are an increasingly significant part of the workforce, companies considering mass layoffs should proceed carefully to avoid costly discrimination suits.

**T**he case, *Sprint/United Management Co. v. Mendelsohn*, involved a middle manager with Sprint in Kansas who was one of 14,000 employees laid off in a downsizing. Ellen Medelsohn, 51, claimed that she was fired because of her age and wanted to call on other colleagues to testify that they too suffered the same discrimination.

A district court judge ruled such evidence was inadmissible because those workers did not work in the same division as she

and were not fired by Mendelsohn’s supervisor. But the U.S. Court of Appeals said the testimony should have been admitted because it could have shown a company-wide age bias.

The Supreme Court sent the case back to the lower court, ruling that “me too” evidence could be admitted in certain circumstances. “The question whether evidence of discrimination by other supervisors is relevant is fact based and depends on many factors, including how closely related the evidence is to the plaintiff’s circumstances and theory of

the case,” wrote Justice Clarence Thomas.

While a final judgment could take years, the case points out that companies need to take care in dealing with workers where age discrimination could be a factor.

The federal Age Discrimination in Employment Act (ADEA) prohibits employers from discriminating against employees and applicants who are 40 years of age or older on the basis of their age. It applies to all private employers with 20 or more employees and to federal

### This Just In

**D**irectors’ and officers’ liability insurance costs for financial institutions significantly increased in the fourth quarter of 2007, due largely to the subprime mortgage crisis, according to a recent D&O pricing index.

D&O insurance costs for banks and securities firms increased 18.66 percent from the fourth quarter 2006 to the fourth quarter 2007. Firms operating in industries outside the financial services sector experienced an 18.99 percent decrease in D&O costs during the same time period.

During the last three months of 2007, the S&P 500 Financial Sector saw a 21.62 percent drop in the value of a broad index of financial institutions, creating larger risk exposures for the directors and officers of these firms.





# Sound Methods for Reducing Noise Hazards

Noise-induced hearing loss is one of the greatest occupational health threats in the United States – a silent threat that can go unnoticed because it develops over time, there are no visible effects and except in very rare cases, there is no pain.

According to OSHA, more than 30 million American workers are occupationally exposed to hazardous noise levels and 10 million workers suffer work-related hearing losses.

Under OSHA regulations, businesses must accurately identify employees exposed to noise levels at or above 85 decibels (dB) averaged over eight working hours. This is done by testing and mapping noise levels. As a rough guide, if workers have to raise their voice to speak to someone within touching distance they are likely exposed to excessive noise. Other telltale signs are ringing ears or dull hearing after leaving a noisy place.

Workers exposed to noise levels above 85 dB must comply with strict exposure limits as detailed in the table to the right. The employer must notify each employee who is exposed at or above the action level of the results of the monitoring. Employers that have any workers whose noise exposure meets or exceeds these levels must develop a hearing conservation program for them.

To satisfy OSHA requirements, this program must include annual monitoring, audiometric (hearing) testing, hearing protectors, training and recordkeeping.

Noise level	Time Exposure
85 dB	8 Hours
88 dB	4 Hours
91 dB	2 Hours
94 dB	1 Hour
97 dB	30 Mins
100 dB	15 Mins
103 dB	7.5 Mins
106 dB	< 4 Mins
109 dB	< 2 Mins
112 dB	< 1 Min

Environmental noise levels can be significantly reduced by using ear protection devices. Most manufacturers will give a noise

reduction rating (NRR), or a measure of the reduction in noise, in decibels, the device achieves in a laboratory setting. Occupational health professionals use several different calculations to determine noise exposure, but generally speaking, you can estimate effective noise exposure levels by subtracting the NRR from the environmental noise level. You want a NRR high enough to block harmful noise, but not so high that the worker is unsafe.

There are three basic types of hearing protection devices:

✱ **Expandable foam plugs** – These conform to the shape of the individual’s ear canal to block sound. They provide good protection if they fit right. But the plugs must be rolled into shape manually. This means that they will not always fit properly and could introduce dirt or dust into the ear canal.

✱ **Premolded plugs made from silicone, plastic or rubber.** These are washable and convenient and won’t introduce dirt into the ear canal. However, each worker must find the right size and style to make sure they adhere properly to the shape of the ear canal.

✱ **Earmuffs.** These block noise by covering the entire outer ear. Some contain noise cancellation electronics that produce sound waves designed to counteract specific environmental noise. Other features allow users to communicate. But they work poorly if not properly sealed around the ear, which is often the case for workers with glasses, beards or long hair. Also, they can be heavier than other devices and can get hot.

HEARING—continued on Page 3





#### DISCRIMINATION—continued from Page 1

and local governments. It also applies to state governments, although their employees cannot sue them directly for age discrimination.

The ADEA protects workers from age discrimination in every phase of the employment relationship, including help-wanted ads, interviewing, hiring, compensation, promotion, discipline, job evaluations, demotion, training, job assignments, and termination. Not only does the ADEA prohibit employers from discriminating against older workers in favor of those who are younger than 40, but it also prohibits employers from discriminating among older workers. For example, an employer cannot hire a 43-year-old over a 53-year-old simply based on age.

The federal Older Workers Benefit Protection Act (OWBPA) amended the ADEA to specifically make it illegal for employers to use an employee's age as a basis for discrimination in benefits and retirement. Like the rest of the ADEA, the OWBPA only protects people who are at least 40 years old. Under this law, an employer cannot reduce health or life insurance benefits for older employees, nor can it stop their pensions from accruing if they work past the normal retirement age. In addition, the Act prohibits employers from forcing employees to take early retirement.

Many state laws also prohibit discrimination on the basis of age; some apply to employers with fewer than 20 employees.

In fiscal year 2007, the Equal Employment Opportunity Commission received 19,103 charges of age discrimination. EEOC resolved 16,134 age discrimination claims and recovered \$66.8 million in monetary benefits for charging parties and other aggrieved individuals (not including monetary benefits obtained through litigation).

Sheldon Steinhauser, an associate professor of Metropolitan State College of Denver and president of Sheldon Steinhauser and Associates, a diversity consulting firm, predicts that the problem will worsen in the near future. "Age discrimination complaints go up and down depending on the economy," he says. "If there are a lot of layoffs there will be more cases filed."

Other factors could amplify the effect. With more people putting off retirement, there are more older employees in the workforce. "With this generation of boomers – they are more educated and are more likely to seek legal help and file complaints," Steinhauser says.

The best way to prevent discrimination charges is for companies to proactively pro-

mote age diversification, he advises. "There's a distinct economic benefit to older workers – they are more dependable, very motivated and have a tremendous amount of experience and relationships with customers and managers," he says. "From the CEO down – there should be a commitment to value older adults and to create an age-diverse workforce. This should be a factor in every supervisor's evaluation."

Steinhauser notes that the law on age discrimination is broad. "All age has to be is a factor – and not even the only factor [in employment decisions]," he says. "It's most important for companies to have a positive approach to age. One of the things that will protect them against lawsuits is if they show they are age diverse."

General liability policies exclude employment-related claims. For protection from age discrimination and other employment-based liability claims, you will need employment practices liability (EPL) coverage. Coverage terms for these nonstandard policies vary by carrier, but all will reimburse the insured company for legal defense costs and any judgments or settlements. For information, please contact us. ■

#### HEARING—continued from Page 2

Experts recommend annual training to ensure proper device use, supervision to make sure devices fit properly and encouraging workers to use the devices outside the workplace to reduce the chances of cumulative damage.

It's also important to remember that noise is not the only risk factor. Exposures to chemicals and other substances can also cause hearing loss. Combined exposures to noise and chemicals can cause more hearing loss than exposure to either agent alone. Vibration and extreme heat are also potentially harmful to hearing when combined with noise. Employers whose workers contact these substances will likely want to implement a hearing conservation program, whether or not noise levels require one. ■

#### VALUATION—continued from Page 4

and might not be enough to restore the business to its pre-loss position.

Calculating the RR value for insurance purposes can present a challenge. You can use yardsticks such as capitalized cost, value per square foot and inflation. However, these indexes may not be relevant for your specific property.

To avoid paying too much for your coverage, make sure any valuation you use bases the RR cost value only on property covered under the policy. In most cases this would exclude items such as foundations, underground wiring, finance costs, land values, etc.

Another common mistake is to include renovation or remodeling costs that add little

or no value, or to include depreciation costs that have no impact on the RR level. Business owners also often overlook the important step of regularly updating their property valuations to reflect changing market conditions or updated inventories of business-personal property.

Having an accurate valuation on your property can have a huge impact on the amount of your claim settlement. And that can mean the difference between returning your business to sound financial health after a disaster...or not. For more information on obtaining the right kind and amount of insurance on your company's property, please contact us. ■



# Property Valuation: What's It Really Worth?

Accurately valuing your property is the first step to ensuring effective coverage. If you place an overly high value on your property, you pay more premium than you need to. If you undervalue it, you may not have enough limits to cover a loss.

**C**alculating the value of property for insurance purposes can be deceptively difficult. Companies that use a do-it-yourself approach often make basic errors.

The first question to ask yourself is what property should be insured? Obviously all buildings and essential structures should be covered, including all the technology and energy infrastructure they contain. But take care not to overlook other structures, such as fences, security systems and parking facilities. The other major property category is business-personal property. This will include the company's inventory, office equipment, computers and maintenance equipment.

The basic property policy does not include coverage for debris removal and additional costs for constructing to meet current, stricter building codes—consider adding these coverages to avoid unexpected rebuilding costs.

You can use many different valuation cri-

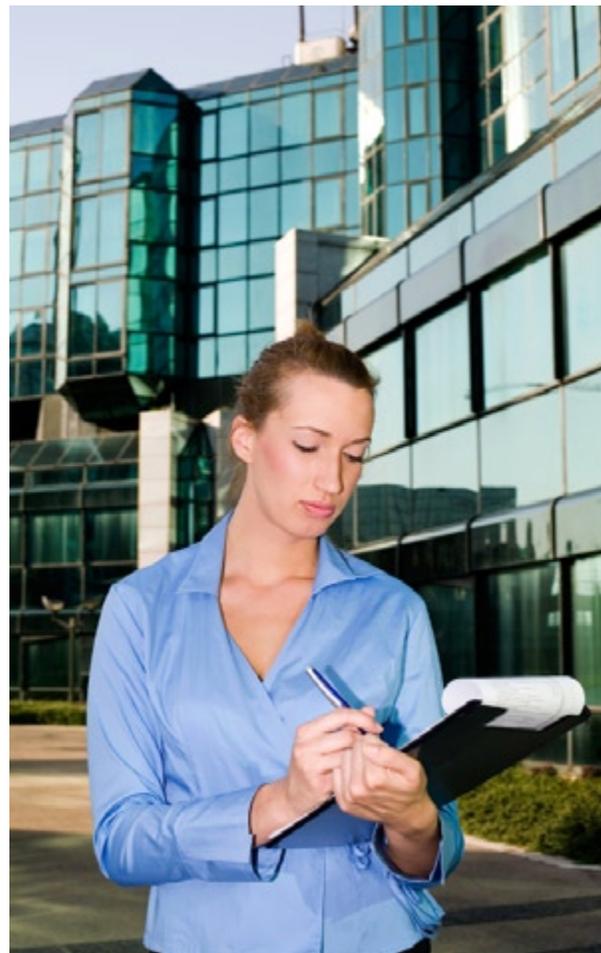
teria for commercial properties, such as tax assessment valuation, accounting valuation and market worth. Using the purchase price of a property as a starting point is one common error – often it has little relation to replacement value.

For insurance purposes, only two valuation methods really matter:

**Repair/replacement cost value (RR)** – This represents what it would cost an owner to completely replace a facility with all new construction, business-personal property, etc.

**Actual cash value (ACV)**, which is usually defined as replacement cost minus depreciation.

Most commercial property policies use RR. This approach means facilities are rebuilt with new materials after a loss. But



some policies still carry ACV provisions. A policy using ACV valuation will generally cost less, but because the insurance company takes depreciation into consideration when paying the loss, it also means that your claim payout will be lower than with an RR policy

VALUATION—continued on Page 3

## Property Valuation Errors Can be Costly

**O**btaining a professional property valuation can help insureds avoid many common property valuation errors. If your company has significant business personal property, multiple locations, any form of unique construction or sizeable total values, you may wish to consider using a professional appraisal service. When you consider the potential costs of over- or underinsurance, the cost of this service could pay for itself in a short time.

A professional appraiser has the

advantage of being able to use up-to-date comparative information. Different appraisers have different specialties, so make sure any firm you use has experience evaluating properties like yours.

Appraisers offer a range of services:

- ✦ Developing accurate values by using multiple indexes, modeling approaches and other techniques
- ✦ Calculating depreciation accurately
- ✦ Identifying property excluded in

the policy to avoid reporting it

- ✦ Providing documentation that can help prove loss in the event of a claim
- ✦ Providing expert testimony in case of loss.

Some appraisers will offer periodic updating of your property valuations at a reduced charge and appraisals for property difficult to value, such as art.

For information on obtaining a property valuation, please contact us. ■