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The Lawyers of Triquetra Law focus our practice on ACE:

Appeals

Civil Rights

Employment Law & Policy

U.S. Supreme Court Hears Older Worker Cases This Term

The U.S. Supreme Court will hear a variety of cases affecting older workers during its current term. These cases focus on various aspects of the **Age Discrimination in Employment Act** (the "ADEA"), 29 U.S.C. §621 *et seq*. The ADEA protects older employees (age 40 and older) from discrimination in hiring, firing, compensation, and other conditions, terms or privileges of employment based upon their age. The Supreme Court ADEA cases this term include:

Federal Express Corp. v. Holowecki, *Docket No. 06-1322* (argued Nov. 6, 2007). The Court must decide whether an intake questionnaire submitted to the Equal Employment Opportunity Commission ("EEOC") qualified as a "charge of discrimination" required by the ADEA, even if the EEOC

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Triquetra Celebrates Art Read's Award!

Attorney Art Read of **Friends of Farmworkers**, Inc. received a well-deserved award this Fall. He is the second annual recipient of the **Morris Dees Justice Award**, sponsored by the U. of Alabama and the law firm of **Skadden, Arps, Slate, Meagher & Flom.** The award was established to honor **University of Alabama Law** School Alumnus Morris Dees, a well known civil rights attorney and founder of the **Southern Poverty Law Center.** Attorney Dees presented the award to Art in a room filled with Art's friends and co-workers.

Triquetra congratulates Art Read on his award and is proud to work with him as an advocate for justice!

Art Read & Sharon López at Morris Dees' Justice Awards in NYC.

Age Discrimination in the Workplace is Unlawful By Sharon R. López, Attorney at Law

Many workers assume that years of devoted service and a good work ethic is enough to keep their employer happy. For most employers, this is enough; however, some employers view older workers as a liability. This is called ageism. **Ageism** in the workplace is contrary to both Pennsylvania law and federal law.

The Pennsylvania Human Relations Act prohibits age discrimination in the workplace. **43 P.S. § 951 et seq.** Pennsylvania law is very similar to the federal law that prohibits age discrimination. **29 U.S.C. § 621 et seq.** The main difference is that Pennsylvania law covers all employers with four or more employees, while federal law only applies to employers with twenty or more employees for twenty or more calendar weeks in a year.

An employee may be a victim of age discrimination if the employee or prospective employee meets the following criteria:

- The employee is over 40 years of age;
- The employee is qualified for the job at the time the discriminatory practice occurred;
- The employee was fired, demoted, not promoted or hired, even though the employee is qualified (an "adverse employment action");
- The employer either replaced the older worker with a significantly younger worker, the employer gives preference to younger workers, or the employer continued to seek applicants with comparable qualifications after the older worker applied for the job.

There are two ways employees can prove this part of their case: with ***direct evidence*** of discrimination or with circumstantial or ***indirect evidence*** of discrimination. Direct evidence includes clear statements by the employer that show it is relying on age to make an employment decision. For instance, if an employer states that it is "looking for younger single people," this is sufficient direct evidence it unlawfully considered age in the hiring process. **Fakete v, Aetna, Inc., 308 F.3d 335, 338 (3d Cir. 2002).** Where there is direct evidence of discrimination, the employee must simply prove that age was the ***motivating factor*** in the adverse employment action. This is distinguished from the use of indirect evidence, which requires the employee to prove age was the ***determinative factor.***

Circumstantial evidence can also prove discrimination. An employee who can prove the four bulleted elements listed above has enough evidence to show that the employer may have used age as a factor in the adverse employment action. After the employee offers this circumstantial evidence of age discrimination, the employer must ***produce some evidence*** that the firing or demotion occurred because of some other nondiscriminatory reason. For instance, the employer can produce disciplinary records that indicate poor performance, or that a layoff affected a whole range of persons. If the employer offers the nondiscriminatory rationale for firing, the employee may offer proof that the employer's reason was pretextual.

Arguing pretext is the same as stating "that is not the real reason." In pretext cases, the employee must prove that the employer considered age, and age was the ***determinative factor*** in the adverse employment action. This is in contrast to the "direct evidence" cases, in which age may be simply a "motivating" factor. This is challenging and often requires careful examination of the facts.

If an employee successfully proves age discrimination under federal law, the employee may receive:

- Back pay
- Front pay (pay expected until normal date of retirement)
- Out of pocket expenses (no pain and suffering)
- Liquidated damages (double damages) if the violation was willful
- Pre and post judgment interest
- Court costs and disbursements
- Attorney fees
- Equitable relief

Losing your job or failing to be hired because of age discrimination is emotionally draining as well as financially crippling. If you suspect you're a victim of age discrimination, contact Triquetra Law Offices for a case assessment. **Call 717-299-6300.**

Legal Notes:

What Employees need to know about Severance Agreements

By Andrea C. Farney, Attorney at Law

Employees—Know your Rights! Many employees do not realize that they can bargain with their employer about the terms of their termination or separation. Employers offer severance agreements to remove uncertainty about legal liability for firing or laying off an employee. This is particularly true for employees over 40 years old, but also applies in many other termination circumstances. An employee should never sign a settlement agreement waiving rights to sue an employer if the employee is unaware of legal claims that he or she is giving up in return.

Sometimes it is a good thing to be 40 or older. Workers age 40 and older have particular rights that must be protected by an employer seeking a release of legal claims. These rights come from a law known as the Older Workers' Benefit Protection Act, or **OWBPA** for short. OWBPA requires that a valid release of claims must be entered into by an employee in a knowing and voluntary manner.

When an employer seeks to have an employee waive rights or sign a "release," OWBPA provides employees who are 40 years and older with special protections. OWBPA requires that a release be what is called "knowing and voluntary." Translated into requirements, a "knowing and voluntary" release is one that:

- Is written in plain language so the employee can understand it;
- Specifically refers to the legal rights and claims that the employee is giving up;
- Advises the employee to consult with an attorney prior to signing the agreement;
- Is supported by money or benefits to which an employee is not already entitled (salary or wages already earned does not count);
- Only applies to claims arising prior to the date the agreement is signed; and
- Clearly explains that the employee has 21 days to consider the release and has 7 days to revoke it after signing.

Group terminations and early retirement package rules are slightly different. Group layoffs and "early retirement" packages are common mechanisms for an employer to trim its workforce. Employees in these situations may also have special protections, although the rules vary slightly, e.g. having 45 days to review the agreement.

Know your rights! Leaving your job can be stressful. All employees, even those under 40, should be aware that their particular situation may dictate that an employment separation or severance agreement is possible and worthwhile.

Elements of a Fair Severance Agreement

- ***Reasonable compensation beyond what you are already entitled to (must be more than wages or benefits owed);***
- ***Mutual promises by the employer to release claims against you;***
- ***Neutral references and letters of recommendation;***
- ***Continuing health benefits for a reasonable period;***
- ***Mutual confidentiality provisions; and***
- ***Time to consider the agreement and to consult with an attorney before signing***

For help with obtaining a fair severance agreement contact Triquetra Law Offices at (717) 299-6300.

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Morris Dees, Sharon López & Andrea Farney

Watch for updates on our web site ***News & Resources*** *Section! The attorneys at Triquetra Law concentrate on appeals, civil rights, and employment law and policy.* ***Call 717-299-6300*** *to set up a thorough case assessment.*

Triquetra attorneys helped the **Lancaster Bar Association** Diversity Committee organize a trip to the **United States Supreme Court** on October 2, 2007. Participants heard arguments in two criminal sentencing cases, and our own Sharon López successfully moved the admission of 13 local attorneys to the Supreme Court Bar. Congratulations to the new admittees!

Triquetra also attended the **2nd Annual Diversity Summit**, organized by the Pennsylvania Bar Association's Minority Bar Committee. This conference was a marvelous time to meet lawyers who are working toward greater diversity in the legal profession. The day was filled with information about best practices in hiring and retaining diverse legal staff.

DFL participated in the **Business Woman's Power Lunch,** where we provided information about our practice to other local business women. Carol Deem also attended the **National Solo & Small Firm Conf.**, co-sponsored by the PBA's Solo & Small Practice Section. This was a great opportunity to meet with other small firm lawyers across the country.

Older Workers & the Court-cont. from p. 1

did not treat the questionnaire as a charge or investigate the case. The Second Circuit ruled that the intake questionnaire contained the minimal written information required for a charge. The EEOC regulations state that "A charge shall be in writing and shall name the prospective respondent and shall generally allege the discriminatory act(s)."

Sprint/United Management Co. v. Mendelsohn, *Docket No. 06-1221* (argued Dec. 3, 2007). The Court will focus on whether a court must admit "me, too" evidence: testimony from other employees who are not parties to the case but were allegedly discriminated against by others who had no role in the plaintiff's termination. The Tenth Circuit found that the "me, too" testimony was relevant in this case because the other employees were similarly situated and fired around the same time.

Gomez-Perez v. Potter, *Docket No. 06-1614* (cert. granted Sept. 25, 2007). The Court will determine whether the "federal sector" provision of the ADEA prohibits retaliation against employees who complain of age discrimination. The First Circuit held that the Post Office waived sovereign immunity with respect to ADEA suits, but also found that Section 15 of the ADEA does not provide a cause of action for retaliation by federal employers.

Kentucky Retirement System v. EEOC, *Docket No. 03-6437.* (oral argument Jan.9, 2008). This Sixth Circuit case involves a public employee retirement plan. A member of this plan who is eligible for normal retirement benefits based on attained age plus a minimum service requirement, or based upon service alone, is not eligible for disability retirement benefits. Because age may be a factor in determining eligibility for normal retirement, it is an indirect factor in determining eligibility for disability retirement. The Court will decide whether any use of age as a factor in a retirement plan is "arbitrary" in violation of the ADEA.