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Supreme Court Rules the ADEA Does Not Bar Employers from Favoring Older Workers

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The Supreme Court has ruled that the Age Discrimination in Employment Act ("ADEA") does not prohibit what is commonly referred to as "reverse discrimination" — that is, favoring older workers over younger workers — even when the younger workers are within the class protected by the ADEA. *General Dynamics Land System., Inc. v. Cline*, 2004 U.S. LEXIS 1623, No. 02-1080 (Feb. 24, 2004). In a 6 to 3 decision written by Justice Souter (Justices Thomas, Kennedy and Scalia dissenting), the Court reversed a divided panel of the Sixth Circuit, which had held that younger workers between the ages of 40 and 49 could sue their employer under the ADEA for retiree health benefits provided only to workers who were age 50 or older.

Benefit Plans Favored Older Workers

The case arose out of a collective bargaining agreement between General Dynamics Land Systems and the United Auto Workers. The agreement provided retiree health benefits for incumbent employees who were then 50 years old, thus reducing the scope of the benefit contained in prior agreements, which was available to all retirees, regardless of age. A group of protected-age workers — over the age of 40 but not yet 50 — brought suit under the ADEA and state law, alleging that the company engaged in illegal "reverse discrimination" on account of age.

The district court dismissed the case, noting that no court had ever granted relief in a "reverse discrimination" age case, and relying on a Seventh Circuit decision holding that the ADEA does not protect younger workers against older workers. The Sixth Circuit reversed, reasoning that the prohibition of 29 U.S.C. § 623(a)(1) (prohibiting discrimination "because of [an] individual's age") "is so clear on its face that if Congress had meant to limits its coverage to protect only the older worker against the younger, it would have said so." *Cline*, 2004 U.S. LEXIS 1623 **9-10 (citing *Cline v. General Dynamics Land System, Inc.*, 296 F.3d 466, 472 (6th Cir. 2002). The court also relied on an EEOC interpretative regulation that prohibits "reverse discrimination" even when "one [worker] is 42 and the other is 52." 29 C.F.R. § 1625.2(a).

The Supreme Court Reverses

The Supreme Court rejected the Sixth Circuit's analysis, finding that "[t]he prefatory provisions [of the ADEA] and their legislative history make a case that we think is beyond a reasonable doubt, that the ADEA was concerned to protect a relatively old worker from discrimination that works to the advantage of the relatively young." *Cline*, 2004 LEXIS 1623 *18. It found that "Congress's interpretative clues speak almost unanimously to an understanding of discrimination as directed against workers who are older than the ones getting better treatment." *Id.* at **11-12.

In making its determination, the Court rejected three arguments raised by the plaintiffs, who were supported by the EEOC in a brief *amicus curiae*. First, the employees argued that the statute's meaning (prohibiting discrimination "because of [an] individual's age") is "plain when the word 'age' receives its natural and ordinary meaning and the statute is read as a whole giving 'age' the same meaning throughout." *Id.* at *25. Such a reading would prohibit adverse employment action against younger employees protected by the ADEA in favor of older employees. The Court rejected this interpretation, relying in part on the construct that "statutory language must be read in context since a phrase gathers meaning from the words around it." *Id.* at *29. Using that construct, the court reasoned that "age" means "old age" when paired with the word

discrimination, (as in protecting the old against the young). However, 29 U.S.C. § 623(f), which gives an employer a defense to charges of age discrimination when "age is a bona fide occupational qualification," does not mean "old age" but rather means "comparative youth" (*e.g.* that *youth* is a bona fide occupational qualification). Accordingly, the Court found that "age" does not have a single meaning within the statute, and therefore, that the younger employees' rationale failed.

The plaintiffs also relied on a floor debate in which one of the bill's sponsors suggested that the statute was intended to prevent employers from using age as a protected factor in employment decisions, regardless as to whether the "favored" employee was younger or older. The Court called the remark "a single outlying statement" that could not alone "stand against a tide of context and history, not to mention 30 years of judicial interpretation producing no apparent legislative qualms." *Cline*, 2004 U.S. LEXIS 1623 *33.

Finally, the Court rejected the EEOC's regulation (supporting the reverse age discrimination theory) as "clearly wrong" and therefore not entitled to any deference by the Court. Deference is due, it held, only when congressional intent is not clear — a situation that was not present in this case. To the contrary, the Court held that legislative history and "regular interpretive method leaves no serious question" that the prohibition on discrimination because of age "does not mean to stop an employer from favoring an older employee over a younger one." *Id.* at 34

What the Decision Means for Employers

The Supreme Court's decision is more important for what it does *not* do than for what it does. A great many employee benefits and opportunities are allocated by age (or factors that are empirically correlated with age), and a decision to affirm the Sixth Circuit would have been enormously destabilizing. Some, but by no means all, of these allocation schemes are protected by the bona fide seniority and benefit plan defenses incorporated into the ADEA, but application of the Act's affirmative defenses has been narrowed considerably by Congress over the years, and their application in given scenarios is far from certain. By striking down the reverse discrimination theory in this case, the Court provides employers with some additional breathing room.

In addition, if the reverse discrimination theory had received the Court's imprimatur, employers could have been sued for age discrimination by younger *and* older employees for the same discrete decision (promotion or hiring, *e.g.*). This would have had particularly troubling implications for employers in RIF scenarios — frequent targets of age claims. Employers would have had every incentive to seek to "balance" RIF results to achieve perfect age balance, lest they draw fire from one sub-group of the protected class or the other (or both). *Cline* now means that employers can make these decisions properly focused on the merits, without preoccupation about a potential claim that the resulting statistics suggest discrimination against old-but-not-very-old employees.

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