

Employment Law

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BEND BUT DON'T BREAK: APPELLATE DIVISION HOLDS THAT "FLEXIBLE" ANALYSIS IS REQUIRED FOR AGE DISCRIMINATION CLAIMS

By Phillip C. Bauknight

Recently, in *Cohen v. University of Medicine and Dentistry of New Jersey*, Docket No. A-1300-12T1 (App. Div. December 30, 2013), the Appellate Division reversed a trial court's dismissal of an age discrimination claim brought under the New Jersey Law Against Discrimination. The Appellate Division found that the trial court "took a too mechanical approach" in determining whether Plaintiff presented a prima facie case of discrimination. *Cohen* reminds employers that courts are required to consider several factors when evaluating age discrimination claims. An analysis limited only to a comparison of the age difference between the discharged employee and that employee's replacement cannot establish that an employee was discharged for non-discriminatory reasons.

FACTS

Plaintiff was hired by Defendant University of Medicine and Dentistry of New Jersey (the "University") as an associate professor in 1994. Plaintiff began her career on the tenure-track, but later switched to "coterminous-status," which meant she was employed for short "fixed periods." As a result, in 1997, Plaintiff entered into a three-year contract with Defendant University, followed by five consecutive one-

year contracts, a two-year contract in 2006, and finally a one-year contract in 2008.

In November 2008, the University's interim dean informed the University departments that, because of budgetary concerns, all contract employees were considered "non-renewed" unless there was a "sufficient justification" for renewal. In February 2009, shortly after her sixty-ninth birthday, Plaintiff was advised that her contract would not be renewed. Her employment was terminated on June 30, 2009.

PLAINTIFF FILES SUIT

Plaintiff filed an age discrimination lawsuit alleging violations of the New Jersey Law against Discrimination ("LAD"). After a lengthy discovery period, Defendant University moved for summary judgment seeking dismissal of Plaintiff's claims. In opposition to summary judgment, Plaintiff submitted two certifications from her husband, who was a current University employee.

The first certification stated that, after her termination, Plaintiff's job responsibilities were performed by several employees, but identified a particular doctor whom Plaintiff believed was not qualified to take her position. The first certification, however, did not identify the doctor's age -- although the judge mentioned during oral argument that she believed the doctor was approximately sixty-six years old at the time of the motion and approximately sixty-two at the time of Plaintiff's termination. The second certification alleged that Plaintiff's job responsibilities were also partially assumed by faculty members who were forty-seven, fifty, fifty-three, and fifty-seven years old.

When considering the factual assertions in Plaintiff's opposition, the trial court found that Plaintiff failed to make a prima facie case of discrimination because it determined that Plaintiff did "not put forth any evidence suggesting that the non-renewal of her contract was motivated by discriminatory animus." In addition, the trial court found that Plaintiff failed to present any evidence of a "sufficient" age difference

between Plaintiff and her replacements, specifically the sixty-two year old doctor whom Plaintiff contested as her replacement. The trial court did not engage in any additional analysis besides an age comparison. Thus, the trial court granted Defendant University's motion for summary judgment and dismissed Plaintiff's claims. Plaintiff appealed.

THE APPELLATE DIVISION REVERSES THE TRIAL COURT'S DECISION

On appeal, the Appellate Division focused on the trial court's determination that Plaintiff failed to submit evidence that Defendant University sought to replace Plaintiff with someone younger. The Appellate Division explained that, in order to defeat summary judgment, Plaintiff was only required to submit evidence that Plaintiff was replaced by a "candidate sufficiently younger to permit an inference of age discrimination."

Importantly, the Appellate Division advised that while this element could be met by demonstrating that a sixty-nine year old plaintiff was replaced by a thirty-year old, such analysis is not governed by a "mechanistic application" of the ages of the relevant employees. Indeed, the Appellate Division stated that "seldom will a sixty-year-old be replaced by a person in their twenties. Rather, the sixty-year old will be replaced by a fifty-year-old, who in turn, is succeeded by a person in the forties, who also will be replaced by a younger person."

The Appellate Division stated that, when dismissing Plaintiff's claims, the trial court erred because it only compared the ages of Plaintiff and her alleged replacements. Rather, when determining whether a plaintiff has submitted legally competent evidence to establish an inference of age discrimination, the court should be "flexible" and consider -- in addition to age -- such factors as actions or remarks by decision makers that could be viewed as reflecting a discriminatory animus, or evidence of preferential treatment given to employees outside the protected class (*i.e.*, employees under forty).

The Appellate Division also found that, even if the trial court only compared the ages of Plaintiff and all of her replacements, the trial court failed to consider that Plaintiff's responsibilities were assumed by faculty who ranged from seven to twenty years younger than her. The Appellate Division stated that such a wide range of younger employees assuming Plaintiff's job responsibilities provided, at the least, sufficient evidence to support an inference that she was discharged in favor of someone younger and defeat summary judgment. Thus, the Appellate Division reversed the trial court's decision.

KEY TAKEAWAYS

Cohen reminds employers that age discrimination analysis under the New Jersey LAD is not limited to the difference in employee's ages. Thus, when making employment decisions about age-protected employees (*i.e.*, over the age of forty), we would advise against employers restricting their analysis to merely a comparison of their employees' ages. Indeed, *Cohen* illustrates that courts are required to consider other, more discrete factors, when evaluating an age discrimination claim.

This does not mean, however, that employers should feel obligated to employ older employees who no longer meet the required job expectations solely to avoid age discrimination claims. Instead, such moves should be supported by legitimate and documented business reasons that can be explained. As illustrated by *Cohen*, a simple analysis limited to a comparison of the ages of the employees involved will not be enough to defeat a claim of age discrimination, typically one of the more challenging claims to defend.

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