

“REVERSE” AGE DISCRIMINATION

The U.S. Supreme Court has determined that younger workers are not entitled to protection from discrimination under the Age Discrimination in Employment Act (ADEA) of 1967. In contrast, older workers are protected under the Act, which prohibits favoring the young over the old.

In *General Dynamics Land Systems, Inc. v. Dennis Cline et al.*, 540 U.S. ____ (2004), the Court refused to protect younger workers who sued General Dynamics after a collective bargaining agreement eliminated the company’s obligation to provide health benefits to subsequently retired employees, except as to then-current workers at least 50 years old. Cline and the other respondents were less than 50 years old and would not receive health benefits after retirement, yet they were more than 40 years old and thus entitled to the protections of the ADEA.

It is important to provide a general overview of the ADEA. Municipalities are considered to be “employers” under the Act, and thus, are required to comply with its provisions. 29 U.S.C. § 630 (b) (2). The Act makes it unlawful to, among other things, fail or refuse to hire, or to discharge, any individual or otherwise discriminate against any individual with respect to all terms, conditions, and privileges of employment on the basis of age; to classify employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his or her employment status because of age; or to advertise indicating any preference, limitation, specification, or discrimination based on age. 29 U.S.C. § 623.

The main issue in the case is whether protection from age discrimination extends to younger workers. It is clear under the ADEA and subsequent court decisions that older workers, in particular those older than 40 (29 U.S.C. § 631 (a)), are entitled to protection from discrimination because of their age. Because the language of the statute uses the unmodified word “age,” and also prohibits discrimination against workers older than 40, it is not entirely clear whether younger workers are entitled to protection where an employer explicitly favors an older worker over a younger worker. Taking up the question, the Court began an exercise in statutory construction, coupled with an examination of what Justice Souter, writing for the majority, called the “social history” of age discrimination. This examination, in the majority’s view, revealed that age discrimination in the United States is something most commonly leveled against the older portions of society, while our nation has come to embrace the “youth culture.” Justice Souter wrote, “One commonplace conception of American society in recent decades is its character as a ‘youth culture,’ and in a world where younger is better, talk about discrimination because of age is naturally understood to refer to discrimination against the older.” *General Dynamics* at 8. Because of this preference for youth in American society, it is the older worker who Congress intended to protect in the Act. “The enemy of 40 is 30, not 50,” according to Justice Souter. *Id.*

This decision, while an important clarification of the impacts of the ADEA, doesn’t really change the playing field for Vermont municipal employers. It can never be stressed enough that discriminatory hiring, retaliation, or firing, for whatever reason, won’t be tolerated in the courts. Employees should be retained, disciplined, or terminated for their ability to do the job, or, for their inability – Never because of immutable characteristics such as age. This decision *does* affirm an employers’ ability to take certain actions based on an employee’s age. For example, the employer could determine that

benefits will only be continued for a definite class of workers after they retire, and that definite class can be based on a characteristic such as age. Such a classification could not terminate benefits for workers simply because they are getting older, but it could provide a threshold at which employees will no longer be entitled to receive that benefit, such as an age cutoff. Please consult with town counsel before making any employment-related decisions, particularly those based on age classifications.

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