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Evidence of Decision-Maker Bias Supports Age Discrimination Claim

By Erin L. Winters 9/11/2015

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A border patrol agent who was less than 10 years older than other agents who were selected for promotion successfully demonstrated that the agency considered his age to be significant during the decision-making process, thereby rebutting the presumption that the age difference was insubstantial, the 9th U.S. Circuit Court of Appeals ruled.

John France, a 54-year-old assistant border patrol agent assigned to the Tucson Sector of Border Patrol of the U.S. Department of Homeland Security, sought a promotion to a newly created position that would have increased his pay grade. Robert Gilbert was the chief patrol agent in Tucson and established the position sought by France.

Twenty-four eligible candidates applied for the position. Their ages ranged from 38 to 54 years old. France was the oldest candidate. A panel, which included Gilbert, interviewed 12 candidates, including France. After the interviews, the panel ranked the top candidates for final consideration by Chief Border Patrol Agent David Aguilar and Deputy Commissioner Jayson Ahern. France was not selected and the agency promoted four applicants, whose ages ranged from 44 to 48 years old.

France filed a complaint against the Department of Homeland Security alleging age discrimination in the promotion selection process in violation of the Age Discrimination in Employment Act (ADEA). The trial court awarded summary judgment in favor of the agency and concluded that France did not adequately present evidence of age discrimination.

The appeals court reversed and considered France's direct and indirect evidence of age discrimination in the promotion process under the burden-shifting framework set forth in *McDonnell Douglas Corp.*

To succeed on his failure to promote claim, France needed to demonstrate that he was at least 40 years old at the time of his application, he was otherwise qualified for the position, the agency did not select him for promotion and the agency awarded promotions to substantially younger applicants.

The agency contended that the average age difference of eight years between France and the four assistant agents selected for promotion did not meet the “substantially younger” requirement. In a departure from the majority of circuit courts, the court concluded that an average age difference of less than 10 years created a rebuttable presumption as to whether the age difference was insubstantial. The court held that a plaintiff who is not 10 or more years older than a selected group can rebut the presumption by producing additional evidence to show that the employer considered age to be significant.

To rebut the presumption, France pointed to Gilbert’s and Aguilar’s stated preference for promoting younger agents and Gilbert’s repeated retirement discussions with France, wherein France stated that he did not want to retire.

Finally, the court agreed with the district court that the agency had provided a nondiscriminatory, legitimate business reason for not selecting France as the agency demonstrated that France did not possess necessary leadership and judgment skills for the position. However, in reversing the lower court’s decision, the circuit court held that a disputed issue of fact existed with regards to Gilbert’s role in the decision-making process, even though he was not the final decision-maker. Further, the court concluded that the district court erred in its analysis of Gilbert’s influence on the final promotion decisions as well as Gilbert’s retirement discussions with France.

France v. Johnson, 9th Cir., No. 13-15534 (Aug. 3, 2015).

Professional Pointer: Employers should provide training to managers and supervisors at all levels of the organization on equal employment opportunity compliance in the recruitment, selection and promotion process.

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