

AGE DISCRIMINATION CLAIM BY BEACH PATROL CHIEF

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The Age Discrimination in Employment Act of 1967 (ADEA) protects individuals who are 40 years of age or older from employment discrimination based on age. The ADEA's protections apply to both employees and job applicants. Under the ADEA, it is unlawful to discriminate against a person because of his/her age with respect to any term, condition, or privilege of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training. <https://www.eeoc.gov/eeoc/publications/age.cfm>

Potential age related legal problems in the workplace can start out as public relations issues, in particular a lack of communication between an employer's supervisors and employees over 40 years of age. As illustrated by the federal district court opinion described herein, a series of negative interactions along with otherwise innocuous questions by a supervisor to an employee may later prove quite problematic in the event of an age discrimination claim. In this particular instance, statements like "When are you going to retire?" and/or an offhand flippant comment at a meeting like "Just how long are you going to be hanging around here?" were cited as significant indicators of age discrimination.

NEGATIVE INTERACTIONS

In the case of *Cirelli v. City of Wildwood*, 2015 U.S. Dist. LEXIS 109389 (Dist. N.J. 8/19/2015), plaintiff Louis Cirelli alleged a violation of the ADEA, 29 U.S.C. §621, et seq., after his employment with the Wildwood Beach Patrol (WBP) was terminated on July 24, 2012. At the time of his termination, Cirelli, 66 years old, had worked for WBP for 48 years. Cirelli had served as the main supervisor and the number one officer on the beach patrol since 1995. Cirelli had never been reprimanded or disciplined prior to the events which gave rise to his lawsuit.

Anthony Leonetti became the Commissioner of Public Safety and Cirelli's immediate superior in 2011. Sometime thereafter, Leonetti asked Cirelli, "When are you going to retire?" In response, Cirelli said 2012 would be his 49th year on beach patrol and he would like to reach 50 years. Leonetti said was "OK" with him. Both Leonetti and Cirelli described the exchange as "not adversarial," but Cerelli found the conversation "challenging," characterizing the interaction as "negative."

At some point in the fall of 2011, Leonetti directed Cirelli to develop a budget for WBP's 2012 season. Leonetti and Cirelli informally discussed the budget at least one time prior to Cirelli submitting his budget proposal. In so doing, Leonetti directed Cirelli to help the City of Wildwood save money.

Cirelli gave Leonetti a budget on December 16, 2011 which suggested removing three supervisory positions and adding ten lifeguard positions. Cirelli claimed he was attempting to comply with a directive from Leonetti to restructure the staff when he proposed his budget. Leonetti denied that he gave Cirelli any such directive. Leonetti told Cirelli in a January 2012 budget meeting that his restructuring proposal was "absurd."

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Steven Stocks, a WBP Captain, viewed the suggested elimination of supervisory positions as an attempt to fire Stocks. At Stocks' request, Leonetti called a meeting in March of 2012. At the meeting, Stocks provided Leonetti with a list of concerns about beach patrol operations, including "no prequalification of guards, no background checks, no swimming tests, no records, no driving tests, [and] no evaluations of senior lieutenants."

In addition, Stocks presented another list entitled "Chief Cirelli Issues Summary 2012." This list named ten alleged deficiencies in Cirelli's running of the beach patrol, including alleged misappropriation of funds on uniforms, supplies, and boat repairs.

In particular, Stocks claimed Cirelli had solicited and spent "thousands of dollars in donations made to the Wildwood Beach Patrol under the pretense of a 'Lifeguard Association' [while refusing] to turn over the financial records for review." At this March meeting, Cirelli alleged Leonetti was quiet, but Stocks had asked him: "[J]ust how long are you going to be hanging around here?" Stocks later testified that he made this list of Cirelli's deficiencies at Leonetti's request. Leonetti testified that he was unaware of the purpose of the meeting, other than Stocks had asked him to set up the meeting."

At some point in early 2012, Leonetti told Cirelli to concentrate on administrative duties and delegated operational duties that had previously been Cirelli's responsibility to Stocks. Stocks is "some 20 years younger" than Cirelli. Prior to the WBP's Memorial Day opening, Leonetti approved rehiring Cirelli for the 2012 season. Cirelli, however, claimed "his start date was pushed back one month to May 2012, and his salary reduced to \$25,000, in order to save money." Cirelli was "not aware of whether anyone else's salary was also reduced." After Cirelli opened the season, apparently without any problems, he worked until his termination on July 24, 2012.

Prior to his termination, Cirelli complained that "he was shut out of the staff, because he was not included on the Beach Patrol website, in training information and forms given to new lifeguards (which only referenced Stocks as the supervisor)." In addition, Cirelli alleged Stocks had sent e-mails implying that he was "running the beach patrol improperly and not responding to Stocks." Further, Cirelli claimed Stocks had communicated to local media that he was "not on board with decisions of the beach patrol."

On or about May 14, 2012, Cirelli had submitted a formal verbal complaint to Kimberly Hodsdon, Human Resources ("HR") Director for the City of Wildwood, alleging age discrimination and a hostile work environment. At that time, Cirelli also made a request for mediation with Leonetti and Stocks. The HR director later told Leonetti that Cirelli had complained, "but she was not specific," apparently regarding the basis of the complaint.

Leonetti did not speak with Cirelli or otherwise do anything in response to the HR complaint. The City of Wildwood investigator who issued a report in response to Cirelli's HR complaint admitted he never spoke with Cirelli in putting the report together. Moreover, Cirelli did not speak with the city administrator or the city attorney about his HR complaint.

Having reached no resolution with City of Wildwood officials, Cirelli filed a charge with the

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Philadelphia Equal Employment Opportunity Commission (EEOC) on July 11, 2012. EEOC sent the City of Wildwood a copy of Cirelli's charges on July 19.

Leonetti terminated Cirelli's employment on July 24, 2012. Leonetti claimed he consulted no one else in making the decision to terminate Cirelli. Leonetti also denied seeing the EEOC charge until the day after he had terminated Cirelli. In addition to the list of deficiencies cited above, Leonetti justified his decision to terminate Cirelli's employment based on Cirelli's "proposed budget that would have stripped the department of all its senior staff," a proposal which Leonetti deemed "absurd."

Following his termination, Cirelli filed a second EEOC charge on Aug. 1, 2012. Cirelli received a right-to-sue letter from the EEOC on August 26, 2013 and filed his ADEA complaint in federal district court on September 23, 2013. One week later, Cirelli sent a request to the Wildwood City Clerk requesting that his pension be processed, which the Lifeguard Pension Commission Members denied on December 18, 2013, "due to pending litigation." Cirelli then amended his complaint on May 30, 2014, to include his claim for retaliation in addition to his ADEA claim.

SUMMARY JUDGMENT

In his complaint, Cirelli alleged age discrimination, hostile work environment, and retaliation against the City of Wildwood. In addition, to the City of Wildwood, Cirelli had also brought ADEA claims against Leonetti and Stocks individually as well. Cirelli subsequently acknowledged that "the ADEA does not provide for individual liability." Accordingly, the federal district court granted summary judgment to both Leonetti and Stocks.

The City of Wildwood filed a motion for summary judgment to effectively dismiss Cirelli's lawsuit. In so doing, the City of Wildwood argued Cirelli had failed to allege sufficient facts which, if proven at trial, would support a claim for age discrimination, hostile work environment, or retaliation.

In reviewing a motion for summary judgment, the court would "determine whether there is a genuine issue for trial" to determine "the credibility of the evidence or the truth of the matter." In deciding whether to grant a motion for summary judgment on a particular claim, the court would construe all facts and inferences in a light most favorable to the party whose claim would be summarily judged and effectively dismissed without trial proceedings.

AGE DISCRIMINATION

As noted by the federal district court, the United States Supreme Court has ruled that claims under the ADEA require a plaintiff to show that age was the 'but-for' cause of the adverse action. In other words, "but for" Cirelli's age, he would not have had his employment terminated.

Further, the court noted that a plaintiff "must first produce evidence sufficient to convince a reasonable factfinder as to all of the elements of a prima facie case of discrimination." Specifically, in order to first establish a prima facie (i.e. Latin for "on its face") case of discrimination, the plaintiff must demonstrate the following:

(1) he is over 40 years old, (2) he is qualified for the position in question, (3) he suffered from an adverse employment decision, and (4) his replacement was sufficiently younger to permit a reasonable inference of age discrimination.

In this particular instance, the parties conceded that Cirelli was "over 40 years old, that he suffered an adverse employment decision when he was terminated, and that his replacement, Stocks, was sufficiently younger than Cirelli to permit a reasonable inference of age discrimination." As a result, in determining the existence of a prima facie case of age discrimination, the federal district court acknowledged the only remaining issue was "whether Cirelli was qualified for the position of WBP Chief."

In making this determination, as a general rule, the court noted a plaintiff's "satisfactory performance of duties over a long period of time leading to a promotion clearly establishes his qualifications for his job." In this particular instance, the court found Cirelli had "worked his way up from being an 18-year-old lifeguard to WBP Chief over a nearly half-century career, unmarred with any employment-related disciplinary actions prior to the events giving rise to this suit." As a result, the federal district court found Cirelli was "qualified for his position and has established a prima facie case of age discrimination."

NON-DISCRIMINATORY REASONS

To counter Cirelli's prima facie case of age discrimination, the City of Wildwood claimed it had legitimate, non-discriminatory reasons (LNDRs) for terminating his employment, specifically Cirelli had presented "a budget plan that was deemed by his supervisor to be 'absurd'." While citing a listing of Cirelli's alleged "deficiencies," Leonetti claimed he had focused "primarily on the allegations related to the WBPLA." Specifically, Leonetti claimed Cirelli had "stalled" in responding to "legitimate inquiries" about a fund (WBPLA) related to the beach patrol which Cirelli controlled, but the city did not know about. According to Leonetti, Cirelli's actions surrounding the WBPLA fund, in combination with "continuing deficiencies," prompted Leonetti to fire Cirelli.

PRETEXT?

Having offered presumably legitimate non-discriminatory reasons (LNDRs) for terminating Cirelli's employment, Cirelli would have to present sufficient evidence that "cast substantial doubt" on the reasons given by the City of Wildwood and Leonetti. Specifically, Cirelli had to show that otherwise legitimate non-discriminatory reasons were a mere "pretext" and actually "discriminatory animus motivated the employer" to terminate Cirelli's employment based exclusively on his age and not mixed with other factors. To reiterate a basic requirement in an ADEA claim, "a plaintiff must show age discrimination was the "but-for" cause of the adverse action, not merely a motivating factor."

The City had argued that Leonetti terminated Cirelli because Cirelli had "presented a budget plan that Leonetti deemed 'absurd'." In response, Cirelli claimed he had created this budget "at Leonetti's express direction." Moreover, Cirelli pointed to the fact that his December 2011 budget proposal did not affect Leonetti's approval of his rehiring for the 2012 season.

In the opinion of the federal district court, this evidence cast reasonable doubt on whether the City's articulated legitimate non-discriminatory reason (LDNR), i.e., the "absurd" budget proposal, was the "true motivation" for Cirelli's termination. As noted by the federal district court, a "plaintiff may survive summary judgment by submitting evidence from which a factfinder could reasonably disbelieve the employer's articulated legitimate reasons." As a result, the court denied the City's motion for summary judgment "on the basis of this proposed LNDR."

The City's second LNDR focused largely on the WBLA allegation against Cirelli. Specifically, the City had argued Leonetti terminated Cirelli, because he "stalled in responding to legitimate inquiries" regarding the fund Cirelli controlled "relating to the beach patrol that the city did not know about." In particular, the City claimed Cirelli "solicited and spent thousands of dollars in donations made to the Wildwood Beach Patrol under the pretense of a 'Lifeguard Association' and refused to turn over the financial records for review."

In response, Cirelli had clarified that "the fund dealt with a beach patrol alumni association that was not actually associated with the City." Moreover, Leonetti had admitted that Cirelli, when asked about this account, had "turned over a checkbook and 'after a while' all the books and records related to the fund." Leonetti further admitted that "he never reviewed the checkbook or conducted any forensic accounting." Instead, Leonetti had "turned the investigation over to his police department." The police department "never issued cause for any action" against Cirelli and had "apparently eventually lost the records."

In light of Cirelli's "eventual cooperation with the investigation and Leonetti's lack of follow-through in determining whether any wrongdoing occurred," the federal district court, once again found "a reasonable factfinder could also disbelieve this proffered LNDR." As a result, the federal district court denied the City's motion for summary judgment on the WBLA fund as a legitimate basis for terminating Cirelli's employment.

DISCRIMINATORY ANIMUS

In addition, the federal district court found Cirelli had presented "sufficient evidence of discriminatory animus to survive summary judgment." As described by the court, a plaintiff "can support a claim of such animus by showing that the employer in the past had subjected him to unlawful discriminatory treatment" or "that the employer treated other, similarly situated persons not of his protected class more favorably." In this particular instance, Cirelli had argued that the City, through Leonetti, had "subjected him to unlawful discriminatory treatment" based upon the following:

reducing his duties and otherwise shutting him out of staff responsibility, while at the same time, treating Stocks, a similarly situated person not of his protected class more favorably, giving Stocks duties that ostensibly belonged to Plaintiff and promoting him into Plaintiff's position once Plaintiff was terminated.

As noted by the court, Stocks had also asked Cirelli, "Just how long are you going to be hanging around here?" at the same March 2012 meeting where Stocks presented the "multi-page list of Cirelli's deficiencies" which the City claimed were "sufficient for Leonetti to, essentially, "put Stocks in day-to-day control of the department."

In reviewing a motion for summary judgment, the federal court would view the facts in a "light most favorable" to the party who would lose the opportunity to proceed to trial. Applying this summary judgment standard to Cirelli's ADEA claim, at this pre-trial stage of the proceedings, the federal district court found Cirelli had indeed presented sufficient evidence for a judge or jury to reasonably conclude "age discrimination was the but-for cause" of Cirelli's "downgrade in duties and his termination." As a result, the federal district court denied the City's motion for summary judgment on Cirelli's age discrimination claim.

RETALIATION

Under the ADEA, it is unlawful to retaliate against an individual for opposing employment practices that discriminate based on age or for filing an age discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under the ADEA.
<https://www.eeoc.gov/eeoc/publications/age.cfm>

In this particular instance, the federal district court also considered whether Cirelli had alleged sufficient facts which could establish a claim for "retaliation" under the ADEA. As cited by the court, in order to go forward with retaliation claim a plaintiff would have to show the following:

- (1) he engaged in a protect employee activity; 2) he was subject to an adverse action by the employer either subsequent to or contemporaneous with the protected activity; and (3) there is a causal connection between the protected activity and the adverse action.

Moreover, the court noted "[a] short temporal proximity between the protected activity and the adverse employment action supports an inference of causal connection."

Applying these principles to Cirelli's situation, the court found he had alleged sufficient facts to make a case for retaliation. Specifically, the court found Cirelli had "engaged in a protected activity when he complained to HR." Moreover, the court found Cirelli had similarly engaged in a legally protected employee activity when he later filed his claim with the EEOC. In the opinion of the court, Cirelli was "undoubtedly subject to the adverse employment action of being fired." As for the temporal proximity between the protected activity and adverse action necessary to raise the inference of causal connection, in the opinion of the court, it was "undisputed that Leonetti fired Plaintiff [Cirelli] within a day of the City of Wildwood receiving notice of Plaintiff's EEOC filing."

While Leonetti contended that he was personally unaware of the EEOC filing, the court noted that "Leonetti was at least aware of Plaintiff's verbal complaint to HR just two months prior to his termination." As a result, the federal district court found Cirelli had raised "genuine issues of material fact" on his retaliation claim which were sufficient to overcome the City's motion for summary judgment.

HOSTILE WORK ENVIRONMENT

Cirelli had also alleged a "hostile work environment" claim against the City. As defined by the

federal district court, a hostile work environment claim would require a plaintiff, like Cirelli, to "prove that the workplace was permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment."

In this particular instance, the court acknowledged that specific comments were made by Leonetti and Stocks urging Cirelli to retire. In addition, the court noted Leonetti had "downgraded" Cirelli's duties, "phasing him out of his previous responsibilities, and ultimately terminated his position, without minimal effort to resolve the issues raised." Moreover, along with a "series of negative personal interactions," the court found Leonetti had "demanded and turned over for police investigation financial documents related to the WBPLA account" that Cirelli maintained.

In his deposition, Leonetti had claimed Cirelli was the only individual who signed the checks related to this WBPLA account, "in violation of a city rule that requires that the City of Wildwood CFO sign them as well." The court, however, found no evidence that Leonetti believed Cirelli was "diverting funds to his own, personal purposes, or otherwise engaging in criminal conduct." Further, in the opinion of the court, in "recommending a police investigation" under these circumstances, Leonetti had "inexplicably attempted to criminalize conduct that he believed, at worst, may violate a civil municipal regulation."

Moreover, the court found it "particularly difficult" to infer from these facts that Leonetti had "actually suspected criminal activity." In so doing, the court took particular note of the fact that "the police department (which Leonetti also supervised) lost the records Plaintiff [Cirelli] submitted, did a minimal investigation, and never brought charges." Accordingly, based on these facts at this preliminary stage of the proceedings, the federal district court denied the City's request for summary judgment on Cirelli's hostile work environment claims.

CONCLUSION

As a result, the federal district court denied the City of Wildwood's motion for summary judgment on Cirelli's "age discrimination, retaliation, and hostile work environment claims brought pursuant to the Age Discrimination in Employment Act." Cirelli would, therefore, have an opportunity to proceed to trial to prove his claims against the City. In the alternative the parties could certainly come to an agreement to settle these claims and avoid the cost of further litigation.

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