

Another Reason 40 is the New 30:
The ADEA May Not Protect You From Age Discrimination

The Equal Employment Opportunity Commission (“EEOC”) published proposed rules on August 11, 2006 clarifying that favoring an older individual over a younger individual is not unlawful discrimination under the Age Discrimination in Employment Act (“ADEA”). *See* 71 Fed. Reg. 155 (Aug. 11, 2006)(to be codified at 29 C.F.R. pt. 1625).

The ADEA prohibits employers from discriminating against employees who are over age 40 on the basis of age. *See* 29 U.S.C. § 631(a). The proposed regulations implement the Supreme Court’s ruling in *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004), in which the Court overturned EEOC guidance permitting “reverse age” discrimination claims under the ADEA.

Background: *General Dynamics Land Systems, Inc. v. Cline*

In *General Dynamics* employees between the ages of 40 and 49 brought an age discrimination suit under the ADEA alleging that the employer’s elimination of retiree health benefits for workers under 50 violated the ADEA. The workers filed a complaint with the EEOC claiming that elimination of benefits for workers between 40 and 50 years of age was “discrimination with respect to... compensation, terms, conditions, or privileges of employment because of age.” *See* 29 U.S.C. 623(a)(1). The EEOC concurred with the employees and invited General Dynamics to settle. When General Dynamics declined, the employees filed a claim seeking relief under the ADEA and state laws.

At the district court level, the Ohio court labeled the case one of “reverse age discrimination,” (younger employees ages 40 to 50 facing discrimination compared to employees over 50), and dismissed the case on the grounds that the ADEA does not protect younger workers against older workers. 98 F. Supp.2d 846, 848 (N.D. Ohio 2000). On appeal, the Sixth Circuit reversed the District Court, the majority reasoning that the ADEA is clear in its protection of all workers over age 40. 296 F.3d 466, 472 (2002).

General Dynamics appealed and the Supreme Court granted certiorari. Justice Souter wrote for the majority. Justice Scalia filed a dissent as did Justice Thomas. Justice Kennedy joined in Thomas’s dissent. In its opinion the majority reviewed the statutory language, Congressional testimony, and underlying reports and found that there is no support for the premise that Congress intended to protect younger workers over older workers, even if the younger workers are over age 40.

The majority reviewed the text of the statute and concluded that the EEOC had misinterpreted the meaning of the word “age.” The Court inferred that “Congress used ‘age’ (in some instances) as meaning the antithesis of youth, rather than meaning any particular age[.]” 540 U.S. 581, 593. In reaching its conclusions, the Court also focused

on the “social history” of the Act. The Court stated that “the very essence of age discrimination [is] for an older employee to be fired because the employer believes that productivity and competence decline with old age. *Id.* To protect reverse age discrimination would be to misapply the Act because the ADEA does not prohibit favoritism toward older workers.

The Court also dismissed the employees’ argument that the EEOC interpretation was due any interpretational weight because “the Commission [was] clearly wrong” in its reading of the statute because the EEOC failed to properly interpret the word “age” within the context of the Act and its social history. *Id.* at 600.

In their dissents, Scalia, Thomas, and Kennedy all agreed that the language of the statute is clear and comports with Congressional testimony and previous EEOC interpretation that would allow any worker over age 40 to bring an action where an employee experiences discrimination in the benefits of employment on the basis of age. *Id.* at 602-613.

Proposed EEOC Regulations

The proposed regulations are tailored to reflect the majority decision in *General Dynamics*. The proposed regulations expressly state that “favoring an older individual over a younger individual is not unlawful discrimination... even if the younger individual is at least 40 years of age.” *See Coverage Under the Age Employment in Discrimination Act*, 71 Fed. Reg. 155 (Aug. 11, 2006)(to be codified at 29 C.F.R. §§ 1625.2, .4, .5). The new regulations also revise and remove now unnecessary special exemptions that allowed preferential treatment of older workers over younger workers (such as including a preference for workers over 60 in job announcements) since these exemptions are now the rule.

The EEOC is requesting comments regarding the proposed regulations until October 10, 2006. If you have additional questions or wish to submit comments to the EEOC regarding the proposed regulations, please contact Chris Keller at ckeller@groom.com, Heather Meade at hmeade@groom.com or by calling (202) 857-0620.