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EPSTEIN BECKER & GREEN, P.C.

Resurgens Plaza
945 East Paces Ferry Road
Suite 2700
Atlanta, Georgia 30326-1380
404.923.9000

150 North Michigan Avenue
35th Floor
Chicago, Illinois 60601-7553
312.499.1400

Lincoln Plaza
500 N. Akard Street
Suite 2700
Dallas, Texas 75201-3306
214.397.4300

Wells Fargo Plaza
1000 Louisiana
Suite 5400
Houston, Texas 77002-5013
713.750.3100

1875 Century Park East
Suite 500
Los Angeles, California 90067-2506
310.556.8861

Wachovia Financial Center
200 South Biscayne Boulevard
Suite 2100
Miami, Florida 33131
305.982.1520

Two Gateway Center
12th Floor
Newark, New Jersey 07102-5003
973.642.1900

250 Park Avenue
New York, New York 10177-1211
212.351.4500

One California Street
26th Floor
San Francisco, California 94111-5427
415.398.3500

One Landmark Square
Suite 1800
Stamford, Connecticut 06901-2681
203.348.3737

1227 25th Street, N.W.
Suite 700
Washington, DC 20037-1175
202.861.0900

APPELLATE DIVISION STRENGTHENS THE BURDENS A PLAINTIFF MUST MEET TO ESTABLISH A PRIMA FACIE CASE OF AGE DISCRIMINATION UNDER THE NEW JERSEY LAW AGAINST DISCRIMINATION

On May 12, 2006, an Appellate Division decision strengthened the burdens a plaintiff must meet to establish a prima facie case of age discrimination under the New Jersey Law Against Discrimination (LAD) (*Young v. Hobart West Group*, A-1265-04T3, 12/15/05). The court held that in order to establish a prima facie case of age discrimination under the LAD, a plaintiff must demonstrate that she was replaced by someone significantly younger or that “age in any way made a difference” in the treatment she was accorded by her employer. Applying the procedure established by the New Jersey Supreme Court for age discrimination, the appellate court held that (1) an inference of age discrimination is not established when the employee’s duties are distributed among persons similar to his or her age; (2) an inference of age discrimination is not established when the decision maker’s age is similar to the age of the employee; and (3) an inference of age discrimination is not established if an employer considers the retirement plans of the employee. Each of these principles is consistent with prior age discrimination law established in *Bergen Commercial Bank v. Sisler*, 157 N.J. 188 (1999).

In *Young*, the Hobart West Group (Hobart) terminated the plaintiff, a forty-eight-year-old woman, as a cost-reduction measure because of declining profit margins in the staffing business. Subsequent to the plaintiff’s termination, the plaintiff’s position was not filled, but the plaintiff’s former supervisor and subordinates absorbed her duties. The plaintiff filed suit against Hobart alleging, among other claims, age discrimination, gender discrimination, and retaliation in violation of the LAD. Hobart filed a motion for summary judgment, which was granted by the lower court “across the board.”

The court held that the plaintiff could not refute the employer’s legitimate business reasons for the plaintiff’s termination, specifically a cost-reduction measure in response to an economic downturn in the light-industrial staffing business.

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The court explained that the plaintiff was unable to refute the employer's legitimate business reason because she had been promoted earlier in the year, and, therefore, she was promoted while she was in a protected class (age forty-eight) and terminated at the same age. The court, therefore, supported the proposition that a plaintiff cannot sustain an age discrimination case when he or she was hired/promoted while a member of a protected age group and then terminated while a member of that same protected age group. The court reasoned that it would be illogical to suggest that an employer would promote an individual in a protected age group and then terminate her on the basis of age only a few months later. The court used similar reasoning in upholding the lower court's ruling to dismiss the plaintiff's gender discrimination claim, explaining that it would be illogical for Hobart to have terminated the plaintiff based on her status as a woman when she was promoted eight months earlier, with the employer's knowledge that she was a woman.

Similarly, the court also highlighted the fact that both individuals who decided to terminate the plaintiff were close in age to the plaintiff. The court stated that there cannot be discriminatory intent where the decision makers are over the age of forty when the employment decision is made. Accordingly, the court adopted a type of same-actor inference, indicating that a plaintiff under the LAD cannot sustain a case for age discrimination when the negative employment decision is made by an individual in the same protected class as the complainant.

The plaintiff also attempted to establish pretext by claiming that one of her supervisors had told co-employees that the plaintiff was not in it for the "long haul" because she planned on retiring and moving to Montana in the near future. The court determined that these comments did not support an inference of age discrimination or support a finding of pretext. The court stated that employers are entitled to consider the long-term potential of employees when making business decisions. Quoting a decision by the Court of Appeals for the Seventh Circuit, the court agreed that "since younger employees tend to be more mobile than older ones, there is no basis for an inference that employers interested in the long-term potential of an employee prefer young to old."

In addition to holding that the plaintiff could not refute the employer's legitimate business reasons for the termination, the court also held that the plaintiff did not establish a prima facie case of age discrimination because she did not establish that she was replaced by a candidate sufficiently younger to permit an inference of age discrimination. The plaintiff argued that she did not have to demonstrate that her position was filled by a sufficiently younger candidate. The court, however, stated that a plaintiff must establish that he or she was replaced with a candidate sufficiently younger to permit an inference of age discrimination. The court made clear that the question is not necessarily how old or young the claimant or the claimant's replacement was, but rather whether the claimant's age, in any significant way, made a difference in the treatment he or she was accorded by his or her employer. The court explained that a plaintiff may meet the burden of establishing an inference of age discrimination by providing proof of either replacement by someone outside the protected class or by someone younger or, alternatively, by proffering evidence that "age in any significant way made a difference" in the treatment the plaintiff was accorded by his or her employer. A plaintiff cannot satisfy this burden, however, when the employer distributes the employee's duties among coemployees who are similar in age to the employee who claimed that he or she was discriminated against.



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The *Young* decision is good news for employers. In the wake of the *Young* decision, plaintiffs may not be able to establish a prima facie case of discrimination if, after termination, the employee's duties were distributed among other employees in the same protected class. Additionally, an employee may not be able to establish a prima facie case if the decision to terminate the employee was made by an individual in the same protected class as the terminated employee. The case also presents good news for employers because an employee may not be able to sustain a claim of discrimination if the employee was hired or promoted while a member of a protected class and then terminated as a member of that same protected class. In other words, employers may be able to use a recent promotion or hiring of the plaintiff as evidence that discrimination on the basis of a protected class would be illogical following such a promotion or hiring. Finally, employers may consider an employee's retirement plans and may cite long-term potential of employees when making business decisions, and this alone should not provide an inference of age discrimination.

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Please feel free to contact **Maxine Neuhauser** in the firm's **Newark office** at 973/639-8269 or mneuhauser@ebglaw.com if you have any questions or comments. **Daniel R. Levy**, an associate in the **Labor and Employment Department**, assisted in the preparation of this Alert.

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