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Supreme Court Expands Reach of ADEA

By Mordy Yankovich



Mordy Yankovich

In a decision dated Nov. 6, 2018, the United States Supreme Court broadened the scope of the Age Discrimination in Employment Act of 1967 (ADEA) to cover state and local governments regardless of number of employees. *Mount Lemmon Fire District v. Guido*, 859 U.S. ____ (2018).

By way of background, the ADEA only applies to private employers who have 20 or more employees. There had been a split in the federal circuit courts as to whether this limitation, i.e. that the ADEA only covers employers with 20 or more employees, applies to state and local governments. *Kelly v. Wauconda Park District*, 801 F.2d 269 (7th Cir. 1986) (holding that the ADEA does not cover government employers with less than 20 employees); *Cink v. Grant County*, 635 Fed. Appx. 470 (10th Cir. 2015) (same);

Mount Lemmon Fire District v. Guido, 859 F.3d 1168 (9th Cir. 2017) (holding that government employers are covered by the ADEA regardless of number of employees).

The facts of the case are straightforward. Mount Lemmon Fire District, a political subdivision in Arizona, terminated the employment of a 46-year-old man and a 54-year-old man, two of its oldest full-time firefighters, amid budget cuts. Both firefighters filed suit alleging that the Fire District discriminated against them on the basis of their age. The Fire District moved to dismiss the suit on the basis that it did not have the requisite number of employees to qualify under the ADEA. The Ninth Circuit Court of Appeals denied the employer's motion, and the Supreme Court granted *certiorari* to resolve the dispute among the circuits.

The dispute is based on differing statutory interpretations. The applicable provision of the ADEA states as follows:

The term employer means a person en-
(Continued on page 23)

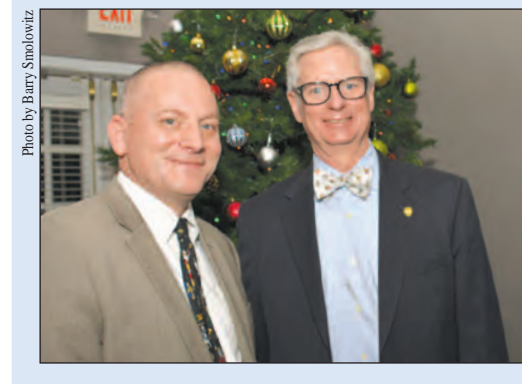


Photo by Barry Smolowitz

Ringling in the Holiday Season with the SCBA

Glenn Warmuth and Academy Dean Patrick McCormick enjoyed an opportunity for collegiality at the Suffolk County Bar Association's Annual Holiday Party on Dec. 14. More photos, page 17.

PRESIDENT'S MESSAGE

Looking Inward to Look Outward

By Justin Block

Believe it or not, the holiday season is actually here. Some retailers believe that the holiday season starts just after Labor Day. Many of us (including this writer) resist that notion, waiting until at least Halloween passes to start thinking about the holidays. During a short weekend jaunt to visit friends in Pennsylvania at the very beginning of November, it pained me to no end to find out that SiriusXM already had a holiday music channel. Oh the humanity!

Many dread the holidays. Shopping, whether for food or for presents (or presents of food); cooking; cleaning in anticipation of relative staying for just slightly too long; wrapping and hiding pres-

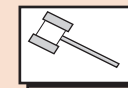
ents; traffic on Route 110, Route 347 or on the Meadowbrook Parkway (or anywhere near any of the malls); or the added pressure of clients wanting "everything wrapped up by the end of the year." All of these, and some others not listed here, including those who tell us, smugly, that "I'm already done with my shopping," are stressors that tend to diminish, if not totally interfere with, the joy of the holidays we might otherwise feel.

I daresay that none of us are exempt. Some dread the holidays for other reasons . . . watching as other people enjoy



Justin Block

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BAR EVENTS

**Swearing in & Robing Ceremony
Monday, Jan. 14 at 9 a.m.**

**Touro Law Center
225 Eastview Drive, Central Islip**

Join us to honor our distinguished members of the Judiciary at their Swearing-in ceremony. For further information, call the Bar Center.

**Save the date
Thursdays in the Courthouse –
Lunch and Learn Series
Central Islip Courthouse, Central
Jury Room from 12:45 – 2 p.m.**

- December 13, 2018
- January 10, 2019
- February 14, 2019
- March 14, 2019
- April 11, 2019
- May 9, 2019

FOCUS ON PERSONAL INJURY SPECIAL EDITION

President's Message (Continued from page 1)

holiday meals in their warm homes, safe from the colder temperatures outside, or thinking about the gifts that they just can't afford to buy their relatives. These problems are real, and pervasive.

It is not uncommon for non-lawyers to think that attorneys have it easy. Wearing dressier clothing, driving nicer cars and otherwise giving the appearance of relative affluence gives the impression that we are free from the cares that afflict others.

We know that nothing is further from the truth.

Like everyone else, attorneys suffer from the same problems that affect the general public. Financial issues, mental health issues (especially depression during the holiday season), substance abuse issues which are made worse by the holiday blahs, all impact lawyers to the same or perhaps even a greater degree than the general public.

Fortunately, help for lawyers from your Suffolk County Bar Association is readi-

ly available.

For many years, the Lawyers Assistance Foundation has been one of the least known but most needed benefits to some of our members. The LAF provides free, entirely confidential help for members who have encountered mental, physical, office management or even financial issues. Many people have taken advantage of the assistance that LAF can provide, especially with respect to substance abuse, case management and mental health issues. In fact, the LAF has its own 12-Step Program meeting at St. Thomas More Church in Hauppauge. For more information, you can contact Jane LaCova at the Bar (ext. 231), Donna England at 631 588-0250 or Arthur Olmstead at 631 754-3200. All inquiries are treated with the utmost discretion and confidentiality.

Not that long ago, I was pleasantly surprised to learn that not only does the LAF provide assistance with health or substance abuse issues, they will also

aid in running a practice and, in appropriate cases, financial assistance. In fact, I recently received a call from Assemblyman Michael Fitzpatrick, asking for help for an attorney (one of his constituents) who was incarcerated and in need of all types of assistance. I put him in touch with Donna England, who not only provided information on the mental health issues, but also reminded Assemblyman Fitzpatrick that, since this constituent had financial obligations, the LAF was in a position to be of help there too.

This example just serves to illustrate that not only does the LAF help lawyers with their practice-related or health-related problems but can also serve as a bridge to help deal with financial issues. And if you suspect that a lawyer has a problem, you can speak with one of the members of LAF, again in strict confidence, and ask for help.

Remember also that the bar association collects unwrapped toys and gifts for

Holiday Magic between now and our holiday party (Dec. 14, from 4 to 7 pm, Great Hall) to be distributed to those who are less fortunate. As H. Jackson Brown Jr. said, "Remember that the happiest people are not those getting more, but those giving more."

If you find yourself anywhere near the Association's headquarters in Hauppauge, please stop in, mingle with your friends and colleagues, and please drop off a gift for a boy or girl who might not otherwise get one. The celebration is free for members and their families, and will give each of us another opportunity to do some good while raising a glass, enjoying a festive meal and laughing or commiserating about the year's triumphs, failures and foibles.

On behalf of our officers and directors, I wish you a very happy, safe and healthy holiday, no matter which you may celebrate.

Supreme Court Expands Reach of ADEA (Continued from page 1)

gaged in an industry affecting commerce who has twenty or more employees . . . The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State . . .

29 U.S.C. § 630 (b).

The Fire District argued that "also means" clarifies the meaning of "person" under the statute to include a "State or political subdivision of a State." Thus, under the Fire District's interpretation of the statute, state and local governments are only covered under the ADEA if it has more than 20 employees. The employees argued that "also

means" adds new categories to the term "employer" under the statute. Under the employees' "additive approach" to the second clause of the statute, state and local governments would be covered by the ADEA regardless of the number of employees.

The Supreme Court agreed with the employees, determining that "also means" provides a new category of employers that are covered under the ADEA. Since the new categories do not include a requisite amount of employees under the statute, the Supreme Court concluded that the ADEA applies to all

state and political subdivisions of a state regardless of the number of employees.

All state and local municipalities, including but not limited to town governments, police and fire stations, are now covered under the ADEA and may be sued for age discrimination under the ADEA. Prior to this decision, public employers could be sued for age discrimination under the New York State Human Rights Law ("NYSHRL"). However, the NYSHRL only covers employers that have four or more employees, other than for claims of sexual harassment, and does not allow for recovery of liquidated dam-

ages and attorneys' fees for claims of age discrimination. Employers who are liable under the ADEA may be liable for back-pay, front pay, liquidated damages and attorneys' fees. Public employers must now be advised that they may be liable under the ADEA, regardless of number of employees, and face additional exposure for claims of age discrimination.

Note: Mordy Yankovich is a senior associate at Lieb at Law, P.C. practicing in the areas of Employment, Real Estate and Corporate Law. He can be reached at Mordy@liebatlaw.com.

Driverless Technology and the Trucking Industry: The Road to Regulations (Continued from page 9)

try is massive and the United States economy is tremendously dependent upon it, we are seeing steady advances in the adoption of autonomous truck technology and it is clear that, although the roles of truck drivers may shift, human involvement remains an essential component. Unfortunately, inconsistent regulatory and legislative response may be a huge roadblock.

Presently, state and local governments have defined roles in safeguarding the safety and promoting the mobility of vehicle operators in their jurisdictions. Those roles include enacting and enforcing traffic laws, vehicle registration and inspection laws, insurance and liability laws, and, more generally, the planning, building and

management of roadway infrastructure.

Each year, the number of states considering legislation related to autonomous vehicles has gradually increased. Presently, autonomous vehicles are legally regulated at the state level only. As of October of 2018, according to the National Conference of State Legislatures, 29 states and D.C. have passed laws pertaining to autonomous vehicles more broadly. These states are taking divergent legislative approaches when it comes to enacting laws related to the testing and operation of autonomous vehicles. In enacting these laws, it is incumbent upon state and local governments to consider amendments to existing traffic laws and regulations that may be barriers to the use

of automated vehicles within their jurisdiction. For instance, several states have following distance laws and those laws will prevent trucks from the participating in the automated truck platooning concept discussed above.

At the federal level, the National Highway Traffic Safety Administration provides recommendations, not regulations. The most notable breakthrough in autonomous vehicle legislation is the Self Drive Act, which passed in September of 2017. The act provides a federal safety framework to support self-driving innovation and technology; however, the act excludes commercial trucks. Thereafter, the Senate introduced the AV Start Act, a similar bill, but that bill was stalled due to con-

cerns raised by organized labor unions about workplace safety and job losses. Thus, despite what many investors and analysts view as potentially lifesaving and profitable technology, the trucking industry is left with a patchwork of inconsistent regulations and recommendations that renders it impossible to operate a truck with this technology on interstate freeways.

Note: Rebecca K. Devlin is a partner with the firm of Lewis Johs Avallone Aviles, LLP. She represents clients in all facets of casualty defense litigation. Rebecca is also a member of the firm's Transportation Law Group, which focuses on the defense of transportation and trucking clients in all transportation matters.